Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

ROSS BROTHERS CONSTRUCTION COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES, LOCAL NO. 577, AFL-CIO,

Intervenor.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Given a collective bargaining agreement containing final and binding grievance/arbitration dispute resolution procedures and the important statutory and public policy objectives achieved by requiring parties to resolve labor relations disputes in accordance with those procedures:

1. Whether refusal by the National Labor Relations Board to defer to grievance/arbitration under the National Industrial Maintenance Agreements ("NIMA") a) over the validity of the contract entered between UA Local 577 and the new contractor association, the Mechanical Contractor's Association of Southeastern Ohio ("Southeastern"), b) over the authority of these parties to enter a binding agreement covering Industrial construction work and c) over reductions of the wage rate as permitted under NIMA Article VIII was an impermissible departure by the National Labor Relations Board from established principles under *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), *United Technologies Corp.*, 268 N.L.R.B. 557 (1984), and *Spann Building Maintenance*, 284 N.L.R.B. 470 (1987), and was thus an abuse of discretion and a significant and flawed change in philosophy on deferral to grievance/arbitration to resolve disputes, thus warranting review by the Supreme Court.

2. Whether, in view of the strong federal labor policies favoring resolution of collective bargaining contract interpretation issues through the parties' grievance/arbitration

QUESTIONS PRESENTED – Continued

processes, the National Labor Relations Board must allow the parties first to obtain contract interpretation of their respective rights thereunder before proceeding to determine if an unfair labor practice has been committed under 29 U.S.C. § 158(a)(5), because deferred Board action would allow full reconciliation and accommodation of the powers and responsibilities of the National Labor Relations Board as described at 29 U.S.C. § 160(a) with the more recently stated Congressional policy favoring final adjustment of disputes by the grievance and arbitration methods agreed upon by the parties as set forth at 29 U.S.C. §§ 201 and 203(d).

3. Whether allowing Ross Brothers to be bound by an association agreement "negotiated" by persons not acting fairly in the interests of Industrial Contractors and with sworn primary loyalty to the same Union with which they negotiated a 14% one-year wage increase and other extravagant changes is in conflict with decisions of other Courts of Appeal and precedent under the National Labor Relations Act, requiring reversal.

PARTIES IN PROCEEDING BEFORE THE COURT OF APPEALS

Besides the parties listed in the caption herein, Huntington Piping, Inc., was a party to the proceeding below. The corporate parent and affiliates of Ross Brothers Construction Company include Seminole, Inc., its parent company, and its affiliate, Proc Robinson Enterprises, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rules 10 through 14, ROSS BROTHERS CONSTRUCTION COMPANY ("Ross" or "Ross Brothers") respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The *per curiam* opinion of the Court below, No. 95-5135 dated April 29, 1997, is not officially reported and was not recommended for publication. It is unofficially reported as 1997 W.L. 215513, 1997 U.S. App. Lexis 1997. The decision of the Court denying the motion for rehearing and refusing the suggestion for rehearing *en banc* that was issued July 14, 1997, is not officially reported.

The decision of the National Labor Relations Board which adopted the decision of the Administrative Law Judge is reported as *Den-Ral, Inc.*, 315 N.L.R.B. 538 (1994). It is also reported at 148 L.R.R.M. 1304, 1994 W.L. 61618 (1994).

JURISDICTION

The decision of the Court of Appeals was entered April 29, 1997. On July 14, 1997, the Court denied Ross Brothers' *Motion for Rehearing and Suggestion for Rehearing En Banc*. This Court has jurisdiction on a writ of *certiorari* to review the judgment of the Court below based on 28 U.S.C. § 1254(1). A *Motion to Stay Issuance of the Mandate* is pending.

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act, Section 8(a)(5), 29 U.S.C. § 158(a)(5):

> (a) Unfair labor practices by employer
>
> It shall be unfair labor practice for an employer
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

National Labor Relations Act, Section 10(a), 29 U.S.C. § 160(a):

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

Labor Management Relations Act, Section 201, 29 U.S.C. § 171:

> (a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;
>
> (b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the

representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

Labor Management Relations Act, Section 203(d), 29 U.S.C. § 173(d):

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

STATEMENT OF THE CASE

Between 1974 and June 1992, Ross Brothers Construction Company ("Ross" or "Ross Brothers") and UA Local

No. 577,[1] had a stable bargaining relationship through their respective bargaining associations,[2] through which they negotiated local wage and benefit rates for Industrial construction work in the Tri-State Ohio – Kentucky – West Virginia region. The wages and benefits were applied on projects covered by the joint UA Plumbers and Pipefitters Union and Industrial construction industry, National Industrial Maintenance Agreement ("NIMA"), which provides for local negotiations of these issues. All parties are bound by NIMA. NIMA is administered by the National Industrial Maintenance Agreements Policy Committee. Grievances concerning the authority of the new Southeastern[3] contractor association to enter into the contract here in issue and the validity of the contract as a local agreement as well as the interpretation and application the alleged Agreement for wages and benefits have been submitted by both Ross and UA Local No. 577 to the NIMA Policy Committee.

Although UA Local 577, through its Building Trades Council and with the specific participation in negotiations of its business agent Phillip Prater, had participated in negotiations with Southern, the contractors association

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[1] United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States, Local No. 577, AFL-CIO.

[2] Ross, as a member of the Southern Mechanical Contractor's Association ("Southern"), bargained through another contractor association, the Tri-State Contractor's Association ("Tri-State"). UA Local 577 was a member of a group of building trades craft unions known as the Tri-State Building Construction Trades Council ("Trades Council") which historically bargained with Tri-State.

[3] The full name of the new association is Mechanical Contractors Association of Southeastern Ohio ("Southeastern").

which represented Ross and other Industrial Contractors, for a new wage and benefit contract to begin June 1, 1992, according to findings by the National Labor Relations Board and the Court of Appeals, Local 577 withdrew from participation in further negotiations with the association in which Ross continued membership.

Instead, UA Local 577 entered into secret negotiations with Southeastern, a new alleged contractor association whose principals were card-carrying UA Local 577 members. These Union-member contractors either performed no Industrial work or were small Industrial contractors. While Ross performs only Industrial work, these contractors also performed Commercial work.

Undisputed record evidence shows that these Southeastern principals, supposedly negotiating on behalf of Industrial contractors, agreed to a 14% first-year wage increase for Industrial work. The increase amounted to $2.72 per hour more than the previous hourly wage rate of $19.00 for all work. Work on Commercial jobs would be paid at a special new hourly rate of $19.60 per hour.

Record evidence shows that the representatives of this new secret contractor association met with UA Local 577 Business Agent Prater for a total of only three (3) bargaining sessions, which together lasted only about 4-1/2 hours. They actually spent only about 1-1/2 hours "negotiating" over wages in the second meeting before reconvening to finalize the Agreement. (Hearing Transcript at Prater 136-38, 447-48, 461). Additionally and remarkably, given that these supposed "negotiation" sessions were the very first sessions for this Local and the new supposed contractor association ever to negotiate, there are no contemporaneous bargaining notes to support any claim that these negotiations were bona fide

negotiations between bona fide arms-length parties where the employer representatives were in fact acting as Industrial contractors employers with a genuine interest at stake in the negotiations. (Hearing Transcript at 443). As noted above, while the rate for Commercial work would be increased from $19.00 per hour to only $19.60 per hour, the Industrial rate of $21.72 per hour would be applied to only a minuscule amount of work by the negotiators, but was the only rate for Ross Brothers.

Thus, for their Commercial work, the new contractor association members had a $2.12 per hour *lower* wage rate than the wage rate they supposedly "negotiated" for Industrial contractors, including Ross Brothers. At $21.72 per hour, the Industrial one-year rate increase was $2.72 per hour, while the Commercial rate was only increased by 60 cents.

While the very range of a 14% increase in one year should have been enough to startle any observer into questioning the bona fides of negotiations for such a wage jump, more questions are raised by the record evidence which shows that the other local unions which remained part of the existing Building Trade/Tri-State Bargaining Group negotiated first-year wage increases in the range of $1.00 to $1.50 per hour.

Thus, these Union Member contractors, supposedly acting in the interest of Industrial contractors, but in fact performing minuscule amounts of that work themselves, negotiated with their own Union business agent Phillip Prater the following "special" terms for the Industrial contractors' work.

1. A 14% first-year wage increase of $2.72 with additional annual increases thereafter for Industrial work.

2. Addition of a new special Industrial wage rate classification, thus separating Industrial rates from the substantially lower ($2.12 per hour) Commercial rates.
3. Fringe benefits for Industrial work based on the number of "hours paid" rather than the number of "hours worked," thus increasing the cost of fringe benefits by 50% for each overtime hour worked.
4. A new apprenticeship ratio for Commercial work, allowing more apprentices.
5. Travel pay.
6. A change in who was required to furnish tools.

Hearing Transcript, Prater 136-138.

Notably, Ross Brothers and Huntington Piping, which previously was a party to this action, were the main Industrial contractors affected by the extravagant wage, benefit and other increases negotiated between the Union-member Contractors and their Union. Neither Ross nor Huntington was informed of these new supposed negotiations or of the formation of the supposed new contractor group. Record evidence shows that its members had not even withdrawn from the existing multi-employer contractor association of which Ross was a member.

In short, the Union-member Contractors and their Union met secretly and quickly wrote up a secret contract that gave the participant contractors a low and reasonable hourly rate increase to $19.60 per hour for Commercial work but which attempted to impose on Ross and other Industrial Contractors a ruinous 14% increase to $21.72 per hour, not even counting increased costs for benefits and other new terms of the supposed agreement.

Moreover, between the completion of the secret negotiations on March 17 and the negotiated June 1 effective

date of the new rates, the Union-member Contractors who secretly met with the Union could plan what work they would seek, based on their secret knowledge of the new rates they had negotiated. (See Hearing Transcript, Prater 117, 368-70, 373-74). Notably, these individuals who the Union claims negotiated a binding agreement governing Industrial contractors like Ross have sworn loyalty and fealty to their Union, the Constitution for which makes each new member promise, " . . . I duly promise and pledge . . . that . . . I will not perform any act in any way prejudicial to the best interest of the United Association, but will at all times endeavor to promote its prosperity. . . . UA Constitution, § 157, pp. 88-89 (General Council, Ex 2). Besides benefitting their businesses, the record evidence shows that more work is available in the summer months than can be handled by regularly working UA Local 577 members. The Union-member Contractors would have priority on the "out of work list" for these high-paying Industrial jobs as soon as they asked for a job referral from their Union. (Hearing Transcript Prater 117, 368-70, 373-74).

Relevant provisions of the National Industrial Maintenance Agreement ("NIMA")

Article VI – Grievances

> . . . Settlement of grievances may be arrived at in any step of the grievance procedure and will be final and binding on the Union and Employer.
>
> Grievances, other than those pertaining to jurisdiction or general wage rates on any work covered by this Agreement shall be handled in the following manner:

> Step 1. . . .
> Step 2. . . .
> Step 3. . . .
> Step 4. If the parties are unable to effect an amicable settlement of [sic] adjustment of any grievance or controversy, such grievance or controversy shall be submitted to the National Maintenance Agreements Policy Committee, Inc. for a decision to become effective immediately.
> Step 5. Failure of the National Maintenance Agreements Policy Committee, Inc. to reach a decision shall constitute a basis for a submittal of the question to the American Arbitration Association for a binding decision. . . .
>
> The arbitrator shall only have jurisdiction and authority to interpret, apply or determine compliance with the provisions of this Agreement. Any award of the arbitrator shall be final and binding upon the Employer and Union.

Article VIII – Wages

> Wage rates shall be those as set forth in the current Labor Agreement of the affiliated Local Union where such work is to be performed . . . unless otherwise modified by National Maintenance Agreements Policy Committee, Inc.

Board decision

The Administrative Law Judge ("ALJ") found that the new association's contractors' retention of their UA Local 577 membership was not of "disabling significance" to the bona fides of their ability to negotiate on behalf of other contractors which would be affected by the extravagant wages. He examined no other aspects of the "negotiations" or their validity. He upheld the validity of the

contract between the new association and UA Local 577 and found it governed Ross Brothers' wage and benefit rates because Ross had agreed through its association and NIMA to be bound by the "local agreement" on such matters. He rejected Ross Brothers' claim that the validity of the new association and the validity of the contract it entered into with Local 577 may be challenged through the NIMA Article VI grievance/arbitration process because he said the issue was "clearly" not covered by the grievance procedure and because in the eleven (11) months between Ross' receipt of notice of the new contract and the new association and the hearing before the Administrative Law Judge, the matter had not been resolved under the grievance/arbitration procedure.

Ross Brothers had also urged that it still was entitled to seek modification of any wages otherwise due under the contract pursuant to the NIMA Article VIII grievance process through which it could ask the NIMA Policy Committee to modify otherwise applicable local wages and benefits on a particular project. The ALJ also refused to defer this issue to grievance/arbitration processes based on the asserted 11-months delay with no resolution. The ALJ decision was entered on September 8, 1993. On November 4, 1994, a three-member panel of the National Labor Relations Board upheld the decision of the ALJ.

On Application for Enforcement of an Order of the National Labor Relations Board under 29 U.S.C. § 160(e), on April 29, 1997, the Court of Appeals for the Sixth Circuit issued a *per curiam* decision granting the Application for Enforcement without addressing the arguments by Ross Brothers that the matter should first have been

deferred to grievance/arbitration of the underlying contractual issues and finding that it would not disturb the credibility assessments of the Board or the ALJ as to the bona fides of the new contractor association on behalf of the industry. On July 14, 1997, the Court denied Ross Brothers' *Petition for Rehearing and Suggestion for Rehearing En Banc.*

REASONS FOR GRANTING THE WRIT

I. The National Labor Relations Board Abused Its Discretion in Failing to Defer Controlling Contractual Issues to Grievance/Arbitration under Collective Bargaining Agreement Before Deciding if Ross Failed to Honor a Valid Collective Bargaining Agreement in Violation of 29 U.S.C. 158(a)(5), Thereby Eviscerating *Collyer Insulated Wire, United Technologies,* and Other Board Cases, and Denied Effect to Congressionally Mandated Federal Policy Favoring Such Dispute Resolution.

There are two different contractual provisions for dispute resolution which are applicable to this case. First of all under NIMA Article VI pertaining to *Grievances,* there is a broad grievance procedure applicable on any "work" covered under the NIMA Agreement, which covers all issues except those specifically pertaining to work jurisdiction and general wage rates. Here, Ross Brothers sought to invoke the grievance processes for final and binding arbitration under Article VI to determine if the new contractor association were a valid body with which a valid local agreement could be negotiated with Local 577 and if the contract they negotiated would be recognized as a valid local agreement under NIMA.

Secondly, even if the Southeastern new contractor association is validly recognized under the NIMA processes and the agreement it reached with Local 577 is a valid local agreement covering wages and other terms, there is still a question of whether the NIMA Policy Committee will reduce the rate Ross must pay pursuant to Article VIII. Article VIII provides that the employer must pay the wage rate set forth in the current local labor agreement "unless otherwise modified by the National Maintenance Agreements Policy Committee, Inc." Thus even if the new contractor association entity is one which may negotiate a valid local agreement under NIMA and the contract is one that is valid and is recognized by NIMA, after resolution of the dispute on these validity issues pursuant to Article VI, the NIMA Policy Committee still has the power under Article VII to modify the wage rates imposed by a local agreement and excuse an employer such as Ross from meeting rates that the Policy Committee deems are too high.

This case fits properly and fully within the doctrine adopted in *Collyer Insulated Wire Co.*, 192 N.L.R.B. 837 (1971). The Board there said it would defer to arbitration even before invocation of those procedures because the case was essentially over the terms and meanings of a collective bargaining contract. Thus, the Board said the question of whether the employer had violated the contract by making certain unilateral changes in the terms and conditions of employment should be settled first under the contract through its arbitration procedure. The Board retained jurisdiction for the limited purposes of considering the matter further if there were a showing that the dispute were not within reasonable promptness *after* issuance of the Board's decision resolved by the

grievance procedure or submitted to arbitration or if the arbitration or grievance procedures were unfair or irregular or reached a result that was repugnant to applicable law. Notably, the Board's concern regarding timeliness was that the dispute be timely resolved after its decision rather than concern that the ALJ herein expressed over how quickly Ross had pressed for dispute resolution under the contract while it was also fighting a Federal court lawsuit and the unfair labor practice claims brought by the Union.

The ALJ herein simply concluded that the broad scope of Article VI not withstanding, the issues of whether the contractor association and the agreement it reached with Local 577 were valid within NIMA requirements were "clearly excluded from resolution as a grievance under Article VI." He relied on *Oak Cliff-Goldman Baking Co.*, 207 N.L.R.B. 1063 (1973) where there was "no claim, and indeed no room for any finding, that the contract's terms even arguably authorized" the reduction in wage rates from those set by the established multi-employer bargaining unit of which that employer was admittedly a member. *Id.* In *Oak Cliff-Goldman*, the question of whether the employer's action was in violation of its statutory Section 8(a)(5) obligations did "not turn on any underlying dispute over the meaning of the contract's terms." *Id.*, 207 N.L.R.B. at 1063.

The facts of this *Ross Brothers'* case make it completely distinguishable from the circumstances with which the Board was presented in *Oak Cliff-Goldman*. Here there is a fundamental question in this multi-tier, multi-employer bargaining context of the validity of the new supposed contractor association as an entity recognized under NIMA *and* as to the validity of the contract

the new association's principals negotiated with their Union, under which by operation of multiple steps in various association-bargaining collective bargaining agreements, they would require Ross Brothers to apply. Moreover, in order to ascertain if Ross Brothers is in violation of its duty to make payments under a collective bargaining agreement, there first must be a finding as to what terms of the subject collective bargaining agreement apply to it. This must especially be so where the contract itself in Article VIII gives the NIMA Policy Committee the power to modify the wage rates that are otherwise applicable.

As to the ALJ's recommendation, and the Board's acceptance of his view, that the Board should not defer first to arbitration of the underlying contractual issues because Ross Brothers had not pressed for fast arbitration, this is not like a case *Jack Thompson Oldsmobile, Inc.*, 256 N.L.R.B. 24 (1981), *enf'd in part and denied in part*, 684 F.2d 458 (7th Cir. 1982) where the respondent employer had not even raised the issue of deferral until after the unfair labor practice hearing. Deferral to the arbitration process is exactly what Ross Brothers has urged since June, 1992, when it first learned of this supposed new employer association and supposed new wage agreement. Since that time Ross Brothers has been under a multi-front attack – a Federal District Court Section 301 suit as well as the unfair labor practice charge here in issue have been filed by the UA Local 577 against Ross. The fact that no arbitral ruling had obtained by the date of the ALJ hearing is not a proper basis to deny arbitration, especially in view of the many avenues of attack the Union has made against Ross Brothers.

Moreover, the decision of the *Ross* ALJ, here adopted by the Board, is inconsistent with the decision of the Board in *Spann Building Maintenance Co.*, 275 N.L.R.B. 971 (1985), *pet. for rev. denied, Lewis v. N.L.R.B.*, 800 F.2d 818 (8th Cir. 1986), and restated in the Board's Supplemental Order and Decision, 284 N.L.R.B. 480 (1987).

Spann Building involved a claim by Veronica Lewis that her employer had violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("Act") by suspending her on January 28, 1983, and then discharging her a few days later. Ms. Lewis filed a grievance over her discharge, but neither she nor her Union went forward with the grievance processing. On June 23, 1983, she filed unfair labor practice charges. The ALJ refused to defer the matter to the contractual dispute resolution procedures. He found that the charge had not been filed until all of the contract dispute resolution machinery had been used without result. He found that neither the charging party nor the Union was seeking arbitration and said that the policies of the Act would not be effectuated by deferring to arbitration.

The Board disagreed with the ALJ. It found that Ms. Lewis' dispute concerning her discharge should have been deferred as required under *United Technologies Corp.*, 286 N.L.R.B. 557 (1984), where the Board stated:

> It is fundamental to the concept of collective bargaining that the parties to a collective-bargaining agreement are bound by the terms of their contract. Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, *it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their*

> *dispute through that machinery* for dispute resolution under the grievance arbitration process is as much a part of collective bargaining as the act of negotiating the contract [footnote omitted]. In our view, the statutory purpose of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief.

Spann Building, 275 N.L.R.B. at 972, *quoting United Technologies*, 286 N.L.R.B. at 559 (emphasis supplied). Explaining what it called "the core concept" of its reasoning, the Board ruled that, in reliance on *United Technologies*:

> We simply hold that where contractual grievance-arbitration procedures have been invoked voluntarily, we shall stay the exercise of the Board's processes in order to permit the parties to give full effect to those procedures.

Spann Building, 275 N.L.R.B. at 972, *quoting United Technologies*, 286 N.L.R.B. at 560, fn.17. While noting that the grievant and the Local had exhausted the procedural grievance steps prior to arbitration, the Local:

> has neither exercised its right to take the grievance to arbitration nor notified Spann that it is waiving its right to do so. Morever, the grievance has not been withdrawn. . . . Until Local 50 either pursues or relinquishes this option, the grievance or arbitration process has not run its course.

Spann Building, 275 N.L.R.B. at 292. Longer delay in pressing for arbitration than is present here was not even mentioned as a concern in view of the paramount policies favoring resolution of disputes by the contractually agreed processes. In *Spann Building*, the Board dismissed

the complaint but retained jurisdiction for limited purposes upon a showing (1) that the respondent was resisting or impeding prompt processing through the grievance and arbitration procedure, or (2) that the grievance and arbitration procedures were not fair and regular or reached a result that was repugnant to the Act. *Id.*, 275 N.L.R.B. at 972-73. The Court of Appeals upheld the Board's decision, expressing concern only over whether the retention of jurisdiction would apply to the conduct of the Union in the arbitration proceeding. It remanded the matter to the Board to consider the limited issue of the propriety and extent of the Board's retention of jurisdiction.

Before the Board again in January, 1987, four (4) years after the discharge in issue, Ms. Lewis asserted that neither the employer nor the Union had made further efforts to resolve her grievance and that the Board was then required to consider the merits of her unfair labor practice charge.

Still, the Board did not step in but said it would retain jurisdiction to consider that "the dispute has not with reasonable promptness after the issuance of this Supplemental Decision and Order" either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration or that the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act. *Spann Building*, 284 N.L.R.B. at 470 (1987). Thus, on June 24, 1987, four and one-half (4-1/2) years after the incident in question, the company and Union still had not resolved the *Lewis* matter through the grievance/arbitration process, and yet the Board felt compelled to allow the

contractual dispute resolution processes to work before further considering the matter.

Another case which illustrates that the contractually agreed-upon dispute resolution procedures were cut off too short in the *Ross* case is *United Beef Co., Inc.*, 272 N.L.R.B. 66 (1984). There, a three-member panel of the Board ruled that a Union steward who claimed that he was discharged in violation of Sections 8(a)(1) and (3) of the Act for protected activity was obliged to proceed to arbitration. The individual had been discharged in January, 1983, and the Board decision was entered September 18, 1984. The Union had withdrawn the grievance from the industry arbitrator after unfavorable rulings on other matters. The Board found that to permit withdrawal of the steward's grievance, in circumstances present here in this case, where the respondent was "willing to proceed and absent any showing that the arbitral process or result would be repugnant to the Act is clearly contrary to the principles of *United Technologies.*" *Id.*, 272 N.L.R.B. at 68.

Notably, the 1984 *United Technologies* case expressly overruled an earlier Board decision in *General American Transportation Corp.*, 228 N.L.R.B. 808 (1977). Under *General American*, the Board had said that its prior deferral policy under *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), would not be applied in cases in which discriminatory discharge or other violations of Sections 8(a)(1) and (3) of the Act were alleged. It would be applied only in cases like this one involving Sections 8(a)(5) and 8(b)(3) where the "dispute is principally between the contracting parties – the employer and the Union [and] the principal issue is whether the complained-of conduct is permitted by the parties' contract." *Id.*, 228 N.L.R.B. at 810.

As noted above, in *United Technologies*, the Board reasserted its position that even unfair labor practice cases involving employee discipline issues should be resolved through the collective bargaining process because of the Board's limited resources and the overall Federal policy of encouraging parties to resolve disputes through their agreed mechanism. The *United Technologies* Board reemphasized the policies that drive application of the *Collyer* deferral doctrine to most unfair labor practice cases and specifically to contract interpretation cases like this one:

> The dispute arose within the confines of a long and productive collective bargaining relationship; there was no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer had asserted its willingness to utilize arbitration to resolve the dispute; and the dispute was eminently well suited to resolution by arbitration.

United Technologies, 268 N.L.R.B. at 558.

Certainly the Supreme Court upheld the Board's interpretation of contract terms in *N.L.R.B. v. C. & C. Plywood Corp.*, 385 U.S. 421 (1967), but in that case, there was no arbitration procedure by which the dispute could be resolved. This is not a case like *Arizona Portland Cement Co.*, 281 N.L.R.B. 304 (1986), where there was no contract recognized in which there was a dispute resolution procedure to be enforced. As the Board said, that case involved "a purely statutory right . . . not one that takes any essence from the collective-bargaining relationship, any present contract. . . . " Thus there was no

contract and no cognizable basis for an arbitral ruling that would resolve the case.

The Board does sit in a different position vis-a-vis enforcement of the Federal labor laws, particularly the prevention of unfair labor practices than do the Federal courts. Specifically:

> The Board is empowered . . . to prevent any person from engaging in any unfair labor practice. . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . . "

29 U.S.C. § 160(a).

Nonetheless, the provisions of Section 10(a) of the National Labor Relations Act quoted above must be accommodated to the later statutory amendments to the labor laws in which Congress declared that the purpose and policy of the Federal labor laws is to allow employers and employees to settle their disputes through the processes of collective bargaining and conference through their respective representatives. 29 U.S.C. § 171. Congress has directed that where there is a contractual dispute in the labor context:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

29 U.S.C. § 173(d).

For more than 35 years the Supreme Court has said that the Federal Courts:

> have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether

> there is particular language in the written instrument which will support the claim. The Agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.

Steelworkers v. American Manufacturing Co., 363 U.S. 564, 568 (1960). In *American Manufacturing*, the Union claimed that the company had violated a specific provision of the contract, and, as here, the employer took the position that it had not violated the clause. There was therefore a dispute as to the meaning, interpretation and application of the collective bargaining agreement, just the type of dispute for which arbitration is set up. The Supreme Court held that the matter was subject to arbitration. "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function under which that regime is entrusted to the arbitration tribunal. *Id.*, 363 U.S. at 569.

> Arbitration is the means of solving the unforeseeably by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement.
>
> * * *
>
> The labor arbitrator performs functions which are not normal to the court; the considerations

> which help him fashion judgments may indeed be foreign to the competence of courts.
>
> * * *
>
> The labor arbitrator's source of law is not confined to the express provision of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

The facts in *Warrior & Gulf* are illustrative because the Union had sought arbitration over the subcontracting of maintenance work. The *Warrior & Gulf* contract said nothing about subcontracting although as in the NIMA contract, the *Warrior & Gulf* contract contained a broad arbitration clause. Thus the Court required arbitration of the dispute.

Issues as to whether the party to a labor agreement has followed the "procedural requirements" or "technical" requirements of the grievance arbitration procedure or whether any non-compliance with time deadlines or other procedural requirements is "excused" or "waived" is likewise, in the context of court proceeding, a matter for the arbitrator to resolve. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). Thus, questions relating to

whether there be excuse, if there need be any, for Ross' failure to demand the next step of the grievance process is most properly for the arbitrator to decide.

More recently, in *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 121 L.R.R.M. 3329 (1986), in the context of Court cases the Supreme Court explained:

> [W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' Doubts should be resolved in favor of coverage.

Id., 475 U.S. at 650, *quoting Warrior & Gulf*, 363 U.S. at 582-83. Again quoting *Warrior & Gulf*, the Court reiterated that "in the absence of a provision excluding a particular issue from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim can prevail." *AT&T*, 475 U.S. at 650, *quoting Warrior & Gulf*, 363 U.S. at 584-85.

In *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964), the Court noted that the parties could resort to arbitration to resolve a jurisdictional dispute even though the matter could be placed before the Board as an unfair labor practice claim. If the Board disagreed with the arbitrator, the Board ruling would take precedence, but the Court said that the Board ruling should not effectively vitiate or preempt the possibility of an arbitral ruling by the parties' chosen dispute resolution mechanism, one that was familiar with the particular work practices of the particular industries involved.

These considerations are apparent in this case where the contract which Ross allegedly has failed to honor is

one that is based on multiple tiers of associational bargaining where the bona fides of the group allegedly negotiating on behalf of the Industrial contractors is seriously in question and the validity of their contract is likewise challenged by Ross. This is exactly the sort of specialized industry setting, with complex interrelated mechanisms, which is best served by resolution of disputes through the grievance/arbitral processes rather than after a rushed hearing with an N.L.R.B. Administrative Law Judge who would not even postpone the hearing despite a serious accident involving one of Ross Brothers' employees, which led to his death and which required the attention of the Company's president, Mr. Morris Griffiths, and medical problems requiring a physician's attention on the part of Mr. Griffiths himself.

This is not a case like *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967) where the Board needed to exercise power to foster the grievance process by requiring the employer to provide information relevant to resolution of a grievance through the arbitration process. Here the unfair labor practice claim itself is bound up in the interpretation of the parties' obligations, which can be resolved through the NIMA grievance/arbitration and dispute resolution processes of Articles VI and/or VIII.

A final case which provides strong guidance that the Board herein should have deferred to arbitration is *N.L.R.B. v. Strong Roofing & Insulating Co.*, 393 U.S. 357 (1969). There the Board found that the employer violated Section 8(a)(5) by refusing to execute a contract that had been negotiated by its employer association where its excuse was simply that it could not afford to pay the new rates. Even so, since part of the question involved the payment of fringe benefits as required under the contract,

Justice Douglas dissented from the majority opinion, which required the employer to pay the fringe benefits, saying that that issue was a matter properly to be determined by the arbitration process, not by the Board. Justice Black would have directed the Board to consider whether the case should have been submitted to arbitration in accordance with the parties contract.

Even the majority opinion focused on the fact, as justifying its decision, that "the employer had refused to recognize the very existence of the contract providing for the arbitration on which he now insists." 393 U.S. at 361. Here throughout these proceedings Ross Brothers has asserted that this matter should be resolved through the NIMA grievance and arbitration provisions and has assured the parties that it will be bound by that result.

In his dissent, Justice Douglas illustrated why arbitration is the right course for resolution of disputes such as this one:

> Arbitration is not a process which the Board is either equipped or qualified to follow. Those who are arbiters have special qualifications in a particular industry and come to know the common law of the shops.

393 U.S. at 364. Justice Douglas asserted that determinating whether the fringe benefits were in fact due under the contract was not a proper question for a computer or "Labor Board . . . computations for insertion in the remedial order." 393 U.S. at 366. He concluded with the admonition:

> What the "common law" of the shop would show covering these fringe benefits, what "past practices" might reflect on the amount of an award, what "a fair solution" of the problem might seem to be in an arbitration frame of

> reference, no one knows. These are matters for arbitrators, chosen by the parties under the collective bargaining agreement, not for the Board, an alien to the system envisioned by Lincoln Mills.

393 U.S. at 366.

Particularly here, where the issues are complex as to the authority of the new Union-member contractor's association to enter into an agreement, as to the validity of the contract it entered with Local 577 and as to whether the wage rates, if they were properly agreed upon, should nonetheless be modified as permitted in Article VIII, the issues are most appropriately resolved through the grievance/arbitral process. Deferring here would not undermine the Board's power ultimately to determine if Ross Brothers engaged in an unfair labor practice, but it would ensure a more informed interpretation of contractual rights and obligations underlying the unfair labor practice allegations and would foster and support the Congressional policy favoring arbitral resolution of disputes such as the one before this Court. The decision in *Ross* is inconsistent with *Collyer* deferral principles which have been applicable for twenty-five (25) years. In circumstances such as those presented here, Federal labor policy and statutory directives require the Board to submit the dispute herein to the NIMA contractual dispute-resolution procedure. Policies favoring resolution of employment-related disputes as expressed in *Collyer* and more recently in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), are too important to be allowed to slip away.

II. Court Cases and Board Decisions Allowing Employers to Make Untimely Withdrawals from Multi-Employer Associations Because Their Interests Are Not Fairly Represented Demonstrate That the New Southeastern Association Is Not a Proper Party to Represent the Interests of Ross Brothers.

Other Courts and the Board itself in several cases have recognized that an employer may make an untimely withdrawal from a multi-employer bargaining unit where its interests are not being "fairly protected" by the multi-employer unit. Not surprisingly, several of these cases have arisen in the context of construction industry bargaining where the employers leading the supposed industry negotiations obtained concessions favoring their segment of the industry by trading harsh terms detrimentally affecting other employers in another segment. As the Court of Appeals for the Eighth Circuit explained:

> [A]n employer or group of employers has a right to expect that his or their interest will be fairly represented in negotiations and that their interest will not be totally sacrificed in the interest of the majority. Here, not withstanding a commitment by the majority that the respondents' interest will be represented fairly, the majority made only a feeble effort to protect the respondents' interest and threw in the towel at the first sign of opposition. [Citations omitted] They did so because they believed their best interest would be served by giving an 85-cents per hour increase and leaving the remainder of the contract as it is [thus refusing to bargain for a special residential rate needed by the small sheet metal contractors.]

N.L.R.B. v. Siebler Heating & Air Conditioning, Inc., 563 F.2d 366, 96 L.R.R.M. 2613, 2617 (8th Cir. 1977), *denying enforcement to*, 219 N.L.R.B. 1121, 90 L.R.R.M. 1239 (1976).

Likewise the Court of Appeals for the Seventh Circuit has recognized that when a member of a multi-employer unit learns that its association's position in negotiations is significantly in conflict with its interests, it may withdraw from multi-employer negotiations even after they have commenced. *N.L.R.B. v. Unelko Corp.*, 478 F.2d 1404, 83 L.R.R.M. 2447, 2449 (7th Cir. 1973).

The Board has applied this same reasoning in *Atlas Electrical Service Co.*, 176 N.L.R.B. 827, 71 L.R.R.M. 1625 (1969). Here the Board adopted the trial examiner's findings that even if he were to find the employer had ceded his bargaining rights to an association, he would allow untimely withdrawal by Atlas from the association-wide bargaining because:

> Atlas' operations are totally different from those of the other members of the Association who are 'engaged in construction.'

176 N.L.R.B. at 830, 71 L.R.R.M. at 1627. Because Atlas' electrical installation operations were so different from the construction operations of other members of the Association, it would have been justified in withdrawing from the multi-employer unit. Here Ross Brothers' operations are plainly different from those of the persons negotiating supposedly on behalf of Industrial contractors. Moreover, the members of the new association have divided loyalties – conflicts of interests as dues paying UA 577 members sworn to uphold the interests of the Union.

Yet another circumstance which the Board has found as justifying late withdrawal from a multi-employer group occurs when individual consensual withdrawals and subsequent agreements, reached through separate bargaining, fragment the established multi-employer

group and leave the remaining employer in a position that would be "unfair and harmful" to the collective bargaining process if it were not allowed to withdraw. *Universal Enterprises, Inc.*, 291 N.L.R.B. 670, 131 L.R.R.M. 1031, 1032 (1988). As the Board there properly said "[A] determination of the presence or absence of unusual circumstances is dependent on an examination of the facts of each case viewed in the light of the parties' bargaining conduct and the impact that this conduct may have on the continued viability of multi-employer contract negotiations." *Id.*, 291 N.L.R.B. at 671.

In light of these principles it was error for the Board to require Ross Brothers to be bound by the supposed "negotiations" of persons whose duties of loyalty to the Union conflicted with their duties on behalf of Ross Brothers and the other Industrial contractors, especially where they admit that after 3 secret meetings and only 1-1/2 hours of "negotiations" on wages, they adopted a 14% wage increase and many other substantially enhanced terms that would injure Ross and the other Industrial contractors. This matter also should have been resolved under the NIMA procedure.

CONCLUSION

For these reasons Ross Brothers respectfully submits that the questions it raises in its Petition for Certiorari present substantial and important questions addressing the role and function of contractual grievance and arbitration procedures and the duty of the Board, insofar as possible, to allow the parties chosen dispute resolution mechanisms to establish their basic contractual rights against which their duties under the Act will be measured. They also demonstrate that the Board plainly erred

in accepting as valid for Ross and the other Industrial contractors the contract negotiated by persons with such divided loyalties as were present here. This matter, too, should have been resolved through contractual dispute-resolution procedures.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION

No. 95-5135

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY,
Intervenor,

v.

ROSS BROTHERS CONSTRUCTION CO.,

and

HUNTINGTON PIPING CO.,
Respondents.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Filed Apr. 29, 1997)

BEFORE: KENNEDY, COLE, and COHN,* Circuit Judges.

PER CURIAM. This is a petition to enforce an order of the National Labor Relations Board (Board) finding

* The Honorable Avern Cohn, District Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

respondents Ross Brothers Construction Co. (Ross) and Huntington Piping, Inc. (Huntington), in violation of § 8(a)(5) and (1) the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, for refusing to pay wages and fringe benefits according to a collective bargaining agreement. For the reasons stated below, we **GRANT** the application of the NLRB and enforce its order.

I.

Pursuant to the National Industrial Maintenance Agreement for the United States of America (NIMA),[1] Local 577 (Local 577) of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (United Association), was part of a long-standing pre-hire agreement[2] with Ross and Huntington.[3] This agreement was the result of two bargaining sessions. The first part of

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[1] Individual contractors enter into NIMA after negotiations with the NIMA Policy Committee. NIMA applies on a project-by-project basis at the employer's election. In return for a prohibition of work-stoppages and lock-outs, it requires employers to pay wages and benefits according to the agreement in effect between local unions and employers working in the local union's jurisdiction. NIMA contains an automatic renewal clause which is binding unless a party provides written notice 90 days prior to termination.

[2] A pre-hire agreement is "a contract agreed to by an employer and a union before the workers to be covered by the contract have been hired." *Deklewa v. NLRB*, 843 F.2d 770, 772-72 (3d Cir. 1988).

[3] Ross and Huntington are separately owned general-contractor companies engaged in the business of renovating industrial plants.

the agreement, which established uniform wage increases and benefits, resulted from bargaining between a group of building-trades craft unions known as the Tri-State Building Construction Trades Council (Trades Council) and area employers who formed a multi-employer bargaining group known as the Tri-State Contractor's Association (Tri-State). The second part of the agreement, which controlled all other terms and conditions of employment, was the result of bargaining between Local 577 and the Southern Mechanical Contractor's Association Southern). In March 1991, the Trades Council and Tri-State agreed to commence non-binding negotiations for a successor wage and benefit agreement to begin after the former agreement expired on May 31, 1992. Although the parties reached an agreement for wage and benefit increases in May 1991, Local 577 voted down the proposed increases and gave notice to the parties in June 1991 that it was withdrawing bargaining authorization from the Trades Council;[4] it gave formal notice to Tri-State on March 4, 1992.

Local 577 then approached a newly formed multi-employer bargaining group, the Mechanical Contractors Association of Southeastern Ohio (Southeastern), and invited them to negotiate a collective bargaining agreement. On March 1, 1992, Local 577 and Southeastern entered into a five-year wage and benefit agreement

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[4] However, the Trades Council and Tri-State formalized their agreement in August 1991. As an incentive for accepting the agreement, Tri-State offered to members of the Trades Council that accepted the agreement an immediate increase in wages and benefits upon their commitment to the new increase. Local 577 did not receive that increase.

effective June 1, 1992. Ross and Huntington received notice of the Local 577-Southeastern agreement by April 8, 1992 and received a copy of the agreement on June 8, 1992. Pursuant to NIMA, Ross filed a grievance with the NIMA Policy Committee. The grievance was not resolved, and Ross continued to pay the wage rates of the preceding agreement. Huntington initially paid the increased wage rate but then reverted to the wage and benefit schedule under the old agreement; Huntington did not file a grievance.

On August 11, 1992, Local 577 filed an action against Ross and Huntington in the United States District Court for the Southern District of Ohio, under § 301 of the Labor Management Relations Act, for failure to pay wages and benefits under the new agreement. On November 30, 1992, the national organization for Local 577, the United Association, filed a charge against Ross and Huntington with the Board. The Board moved to intervene in the district court § 301 action. Although the district court denied that motion, the parties reached a settlement on the Board's appeal from that order, with Ross and Huntington agreeing to allow the Board to intervene as a full party subject to the orders of the district court. Ross and Huntington then filed a motion in the district court to stay all proceedings before the Board pending trial in the district court. That motion has not been decided.

After a hearing before the Board, the Administrative Law Judge (ALJ) issued a decision finding that Ross and Huntington violated § 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1), by unilaterally refusing to pay wages and benefits that they were obligated to pay by the

terms of the Local 577-Southeastern agreement. The Board adopted the findings of the ALJ and ordered Ross and Huntington to cease and desist from unfair labor practices, to implement the wage and benefit terms of the Local 577-Southeastern agreement, and to make employees whole for any loss of wages and benefits suffered as a result of Respondent's unfair labor practices.

The Board now seeks to enforce its order. Respondents raise a host of arguments challenging the Board's exercise of authority over this matter as well as it [sic] findings of fact and conclusions of law about many aspects of the process of the negotiation and application of the agreements. The Board argues that such contentions are without merit. In light of our standard of review, a brief review of Respondents' contentions demonstrates that we must defer to the Board.

II.

We review the Board's exercise of authority for abuse of discretion. *NLRB v. Babcock & Wilcox Co.*, 697 F.2d 724, 728 (6th Cir. 1983). The Board's findings of fact are conclusive if they are supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Litton Microwave Cooking Products Div., Litton Systems-Inc. v. NLRB*, 868 F.2d 854, 857 (6th Cir. 1989). Moreover, the Board's " 'special competence' " in the field of labor relations entitles it "substantial deference" in its interpretation of the NLRA. *Pattern Makers' League of North America v. NLRB*, 473 U.S. 95, 100 (1985) (citing *NLRB v.*

Weingarten, Inc., 420 U.S. 251, 266 (1975). Thus, we must uphold the Board's findings and holding [sic] even if we would have reached a different result had we been the trier of fact in this instance. *NLRB v. United States Postal Service*, 841 F.2d 141, 144 (6th Cir. 1988).

III.

Section 8(f) of the NLRA, 29 U.S.C. § 158(f), permits employers and unions in the construction industry to enter into collective bargaining agreements before the union has established its majority status. Once a § 8(f) contract expires by its terms, either party is free to repudiate the collective bargaining relationship. *See Gottfried v. Sheet Metal Workers Local 80*, 876 F.2d 1245, 1249 (6th Cir. 1989). However, an automatic renewal clause between the parties to an § 8(f) agreement will be given effect and operates to bind the parties to a continuation of the agreement. *See Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1216 n.5 (8th Cir. 1992); *W.B. Skinner, Inc.*, 283 NLRB 989 (1987). This is so even where the renewal clause operates to bind a party to an independent, secondary agreement, the terms of which may be open to negotiation by different parties and remain undetermined. *See Farmingdale Iron Works, Inc.*, 249 NLRB 102 (1980).

An employer who repudiates an agreement which has not expired violates § 8(a)(5) and (1) of the NLRA unless covered employees have voted to reject the union as their bargaining representatives in a Board-conducted election. *John J. Deklewa and Sons, Inc.*, 282 NLRB 1375 (1987), enforced *sub nom. Ironworkers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). *Accord NLRB v. Bufco Corp.*, 899

F.2d 608 (7th Cir. 1990); *NLRB v. W.L. Miller Co.*, 871 F.2d 745, 748 (8th Cir. 1989); *Mesa Verde Construction Co., v. Northern California District Council of Laborers*, 861 F.2d 1124, 1137 (9th Cir. 1988) (en banc). An employer's unilateral refusal to pay wages and benefits in accord with the terms of a current collective-bargaining agreement amounts to a repudiation of the collective-bargaining relationship and thereby violates § 8(a)(5) and (1) of the NLRA. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973).

In the present case, Respondents Ross and Huntington argue that the Board erred in determining that it was appropriate to exercise its authority rather than defer to the parties' NIMA grievance procedure when the grievance had yet to reach arbitration. The Board found, however, that resort to the NIMA grievance procedure was inappropriate insofar as respondents were complaining of wage rates because NIMA did not provide for arbitration of wage disputes. Moreover, the Board found that deferral to NIMA was inappropriate because Ross, the only one of the Respondents to file a contractual claim, as it was entitled to do under the FIMA [sic] agreement, did not pursue that claim to arbitration. Section 10(a) of the NLRA, 29 U.S.C. § 160(a), provides that the Board's authority to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." *Id.* Although arbitration is deemed a preferred means of settling labor disputes, "it is . . . settled that the Labor Board need not refrain from exercising its authority to enforce the Act merely because arbitration procedures are available." *Newspaper Guild*

Local 10 v. NLRB, 63 F.2d 550, 558-559 (D.C. Cir. 1980). *Accord NLRB v. Bay Shipbuilding Corp.*, 721 F.2d 187, 191 (7th Cir. 1983) ("The availability of arbitration procedures does not oblige the Board from exercising its statutory authority.") (citing *NLRB v. Strong*, 393 U.S. 357, 360-61 (1969)). *See also, e.g., NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436-437 (1967) (finding no deferral of dispute over union's entitlement to information alleged as necessary to prepare case before arbitrator). A party's delay, finally, in proceeding to arbitration is an independent ground for the Board's decision to decline to defer to a contractual grievance procedure. *See Spann Building Maintenance Co. and Veronica Lewis*, 284 NLRB 470 (1987) (holding that the Board will exercise jurisdiction if the parties "do not, with reasonable promptness," submit their dispute to arbitration). *Accord United Beef Co.*, 272 NLRB 66, 68 (1984). Accordingly, we find the Board did not abuse its discretion in declining to defer to arbitration. *Babcock & Wilcox*, 697 F.2d at 728.

Turning to the merits, Ross and Huntington contend that the Board erred in finding that Southeastern was a genuine multi-employer bargaining association and that there was no arms-length bargaining. The Board found, however, that former members of Southern had formed Southeastern in 1992 and that its engaged in commercial and industrial plumbing like Ross and Huntington. It also found that nothing in NIMA required the applicable local agreement to be negotiated exclusively with industrial contractors.

Respondents also argue that the Board erred in finding that Local 577 and Southeastern engaged in arms-length bargaining because several of the principals of

Southeastern were also members of Local 577. The Board found, however, that there is nothing inherently disabling in owner-contractors also being union members; it is, in fact, not uncommon in the construction industry. *See Nassau and Suffolk Contractor's Assoc., Inc.*, 118 NLRB 174, 184 (1957) (noting that the Board does not interfere with this practice so long as the union does not attempt to exert unlawful influence upon the employer/union-member and the employer/union-member is not involved in union affairs to any degree of significance.). Despite Respondents' claims that the speed at which the negotiations were conducted was further evidence of a lack of arms-length bargaining, moreover, neither the ALJ nor the Board attached any significance to their speed, based, at least in part, on the testimony of one of the negotiators. We will not normally disturb the credibility assessments of the Board or the ALJ, *Litton*, 868 F.2d at 857, and choose no to do so here.

Next, Ross and Huntington argue that they were entitled to notice before they could be held to the wage and benefit terms of the Local 577-Southeastern agreement, and the Board thus erred in finding that Respondents knew of and repudiated the wage agreement. However, the Board found that Ross and Huntington had actual, if not formal, notice of the wage-and-benefits agreement negotiated between Local 577 and Southeastern as evidenced, for example, by the fact that Huntington initially paid members of Local 577 the wage rates of the new agreement. Moreover, while Respondents argue that Article XXII of NIMA provides that NIMA "will be suspended in any area when the local collective bargaining agreement expires," Local 577 and an

employer bargaining group were at all times part of a local area agreement. Thus, there was no time-gap in the running of Local 577's agreement which could have the effect of suspending NIMA pursuant to Article XXII. *See Cedar Valley Corp. v. NLRB*, 977 F.2d at 1216 n.5 (finding that employer could not repudiate pre-hire agreement where there was no time-gap between the running to the preceding and successor agreements.).

Finally, Ross and Huntington argue that the Board erred in finding that Respondents repudiated their pre-hire agreement. The Board found, however, that Ross and Huntington were signatories to NIMA and were thus bound to pay wages and benefits in accordance with the agreements reached with Local 577 in the areas within Local 577's jurisdiction. It also found that NIMA allowed the parties, including Local 577, to withdraw from the negotiations between the Trades Council and Tri-State. Thus, the Board found that nothing in NIMA required Local 577 to enter into negotiations with any particular multi-employer bargaining group and that NIMA did not invest signatory employers with the right to be included in the determination of local wage and benefit rates. *See Carpenters Eastern District Council v. Blake Construction Co.*, 457 F.Supp. 825, 829 (E.D. Va. 1978) (recognizing that the purpose of national agreements is to relieve regional contractors of the necessity of local bargaining). *Accord Gottfried*, 876 F.2d at 1249 (recognizing that § 8(f) agreements cannot be converted into traditional collective bargaining agreements with lingering rights and obligation absent an election and certification.").

Thus, we find Respondents' contentions are without merit and find no reason not to defer the Board's findings

that Respondents have violated § 8(a)(5) and (1) of the NLRA. *United States Postal Service*, 841 F.2d at 144.

IV.

For the foregoing reasons, we hereby **GRANT** enforcement of the Board's order.

United States of America before the
National Labor Relations Board

Den-Ral, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, of the United States and Canada, Local No. 577, AFL-CIO

Ross Brothers Construction Company *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, of the United States and Canada, Local No. 577, AFL-CIO

The Early Construction Company *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, of the United States and Canada, Local No. 577, AFL-CIO

Huntington Piping, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, of the United States and Canada, Local No. 577, AFL-CIO

November 4, 1994

DECISION AND ORDER

On September 8, 1993, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Ross Brothers Construction Company, Ashland, Kentucky, and Huntington Piping, Inc., Huntington, West Virginia, their officers, agents,

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[1] The Respondents have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondents contend that the judge exhibited bias toward the Respondents. After a careful review of the record, we are satisfied that this allegation is without merit.

We adopt the judge's finding that Local 577's withdrawal from group bargaining was timely and unequivocal. On the facts of this case, we find it unnecessary to pass on whether *Retail Associates*, 120 NLRB 388 (1958), is applicable here. We note that, as the judge found, bargaining over the contractual reopener in March and April 1991 was based on the explicit agreement by the parties that any party had the option, at any time, of ceasing participation in continued group bargaining if it so desired, and that Local 577 expressed its intention to withdraw in June 1991 and again on March 4, 1992.

In dismissing the Respondents' "counterclaim" that Local 577 should be found in violation of Sec. 8(b)(3), the judge noted that the Respondents failed to file a charge alleging that Local 577 violated Sec. 8(b)(3). We take administrative notice that on May 10, 1993, such a charge was filed in Case 9-CB-8543 and that the Regional Director approved the withdrawal of the charge on June 1, 1993.

successors, and assigns, shall take the action set forth in the Order.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DEN-RAL, INC.

and Case 9-CA-30188

ROSS BROTHERS CONSTRUCTION COMPANY

and Case 9-CA-30189

THE EARLY CONSTRUCTION COMPANY

and Case 9-CA-30190

HUNTINGTON PIPING, INC.

and Case 9-CA-30191

UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND
PIPEFITTING INDUSTRY, LOCAL NO. 577

Engrid Emerson Vaughan, Esq.
Cincinnati, OH, for the General Counsel.
Gary A. Snyder, Esq.,
(Snyder, Rakay & Spicer),
Dayton, OH, for the Charging Party.
C. Robert Schaub, Esq.
Huntington, WV, for Respondent-Employers.

Cases 9-CA-30188, 9-CA-30189, 9-CA-30190, and 9-CA-30191

BY CHAIRMAN GOULD AND MEMBERS
STEPHENS AND DEVANEY

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge.

This consolidated matter[1] was heard on May 18 and 19, 1993, in Huntington, West Virginia, upon the General Counsel's consolidated complaint, dated January 8, 1993, and Respondents' timely filed answer served on January 21, 1993.[2] In substance, the consolidated complaint

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[1] Of the four named Employer-Respondents in this proceeding, Den-Ral, Inc. and Early Construction Company entered into settlement agreements with the Charging Party to which the General Counsel did not object and which I approved on the record. Thus the original caption is retained for purposes of conformity with prior records and proceedings notwithstanding the Den-Ral, Inc. and Early Construction Company are no longer parties.

[2] Respondents appended to its answer a motion to dismiss the complaint along with a motion for a more particular statement and a counterclaim. The Division of Judges referred the motion to dismiss directly to the Board on February 3, 1993, pursuant to Sec. 102.24 of the Board's rules. On February 11, 1993, the General Counsel filed an opposition to Respondents' motion to dismss [sic] and on February 17, 1993, Respondents filed a reply thereto.

On May 5, 1993, the Board, in an upublished Order, denied Respondents' motion to dismiss and remanded the matter to the Regional Director for further appropriate action. The Board thus rejected Respondents' contention that the Union, having filed a Sec. 301 action (alleging violation of the collective-bargaining agreement) prior to filing the unfair labor practice charge gave the Federal district court "prior and primary" jurisdiction over the issues raised in the Board complaint, thereby depriving the Board of jurisdiction. The Board ruled that the Board and court had concurrent jurisdiction over alleged violations of the collective-bargaining agreement. *See Smith v. Evening News*, 37 U.S. 195, 197 (1962).

Secondly, the Board rejected Respondents' contention that the complaint be dismissed because the Charging Party, Local 577, is not the party to whom Respondents owe a bargaining obligation. The bargaining obligation flows apparently only to

alleges violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) in that Respondents failed and refused to bargain collectively in good faith with the exclusive collective-bargaining representative of their employees within the meaning of Section 8(d) of the Act. Particularly, that Respondents' failure and refusal to pay the wages, specified in the agreement to which they are bound, amounted to the repudiation of a wage agreement which, in turn, struck at the heart of the collective-bargaining relationship between the parties and amounted to a repudiation of the collective-bargaining relationship itself. *Oak Cliff-Golman Baking Co.*, 207

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the International Union with which Respondents have a collective-bargaining agreement. The Board held that an unfair labor practice charge may be filed by any person including a local union notwithstanding that Respondents' collective-bargaining agreement may actually be with the International Union. See *Postal Service*, 306 NLRB 565 (1992). The Board thus rejected Respondents' contention that the Board is without jurisdiction because the Local Union lacks standing to file the charge.

Lastly, there is Respondents' motion or a more particular statement, requesting "a more particular statement of the factual basis upon which the Complaint is issued . . . in order that Respondents may adequately respond to said allegations and be prepared to meet the issues intended to be presented by the General Counsel." Not only had Respondents simultaneously filed their answer without particularization as prayed for, but there is no mention of the particular allegations in the complaint forming the basis for Respondents' request. I regard the request for particularization to be without merit particularly because it fails to specify in what regard the allegations of the complaint may not be fully answered under the Board's rules.

NLRB 1063 (1974), enfd. 505 F.2d 1302 (5th Cir.1974), cert. denied 423 U.S. 826 (1975).

Respondents filed a timely answer, admitted certain of the allegations, denied others, and denied the commission of unfair labor practices.[3]

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to file posthearing briefs. All parties thereafter timely submitted briefs which have been duly considered.

Upon the entire record, including the briefs, and upon my most particular observation of the demeanor of the witnesses as they testified, together with an

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[3] As above noted, Respondents appended to their answer a "counterclaim" alleging that the failure of Local 577 to meet and bargain in good faith for the purpose of arriving at an agreement constituted a violation of Sec. 8(b)(3) of the Act. Respondents assert that this violation is of such dimension that the complaint should not only be dismissed but that the Board find that Local 577 violated Sec. 8(b)(3) of the Act. The counterclaim is dismissed as without merit. Respondents, having failed to file a charge alleging violation of Sec. 8(b)(3) of the Act, and the Board having failed to issue a complaint alleging such a violation, the Board, sua sponte, may not issue an order finding a violation of that section. The parties, not the General Counsel or the Board, initiate unfair labor practice proceedings.

evaluation of the testimony and other evidence of record, I make the following[4]

Findings of Fact

I. Respondents as statutory employers

(a) The consolidated complaint alleges, and Respondents concede that at all material times, Respondent Ross Brothers, a corporation, with an office and place of business in Ashland, Kentucky, has been engaged in the business of general industrial contracting in the construction industry and, in the 12-month period ending January 8, 1993, in conducting its business operations, purchased and received at its Ashland, Kentucky facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Kentucky. Respondents concede, and I find, that at all material times Ross Brothers has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(b) The complaint alleges, and Respondents admit, that at all material times Respondent Huntington Piping, a corporation, with an office and place of business in Huntington, West Virginia, has been engaged in the business of general industrial contracting in the construction industry and, in the 12-month period preceding January

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[4] The underlying unfair labor practice charge in Case 9-CA-30189 against Ross Brothers Construction Company was filed by Local 577, Plumbers, AFL-CIO, on November 30, 1992, with service on Respondent Ross on December 1, 1992. The charge in Case 9-CA-30191 against Huntington Piping, Inc. was filed by Local 577, Plumbers, on November 30, 1992, and served on Respondent Huntington Piping on December 1, 1992.

8, 1993, in conducting its business operations, has purchased and received at its Huntington, West Virginia facility goods valued in excess of $50,000 directly from points outside the State of West Virginia. Respondents concede, and I find, that at all material times Huntington Piping, Inc. has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LOCAL NO. 577, PLUMBERS, AFL-CIO, AND THE UNITED ASSOCIATION OF JOURNEYMEN ETC., AFL-CIO, AS STATUTORY LABOR ORGANIZATIONS

The complaint alleges and Respondents admit that the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the International or the United Association) has been a labor organization within the meaning of Section 2(5) of the Act. I so find.

Supplementing its answer (par. 3(b)), Respondents also admitted on the record that Local 577 was a labor organization nevertheless reserving the right to change their pleading should further facts warrant a change in position. Neither Respondent further pursued the matter and, I find, on the basis of Respondents' concession that Local 577, at all material times, is a labor organization within the meaning of Section 2(5) of the Act. Such a finding is consistent, of course, with Respondents' counterclaim in which Respondents admitted having made repeated demands upon Local 577 "to meet and bargain in good faith for the purpose of arriving at an agreement" between Respondents and Local 577. In addition, where Respondents' counterclaim would have the Board make a

finding of an 8(b)(3) violation against Local 577, such a violation can only be made against a statutory labor organization. Affirmative proof of Local 577 status may be found elsewhere in the record such as its constitution and bylaws (G.C.Exh. 3) and its affiliation with the United Association (G.C.Br. 3).

III. THE ALLEGED UNFAIR LABOR PRACTICES

Background

The two Respondents, Ross Brothers and Huntington Piping, are parties to the National Industrial Maintenance Agreement for the United States of America (G.C.Exh. 4) (the NIMA Agreement or NIMA) with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO. Both Respondents concede that they entered into the National Industrial Maintenance Agreement and that at all material times they have been, and are, bound by the terms of the NIMA Agreement with the UA. The agreement contains an automatic renewal clause terminable by either party on 90 days' written notice. No such notice was ever given. That agreement contains the following provisions:

ARTICLE VIII – Wages

> Wage rates shall be those as set forth in the current labor agreement of the affiliated Local Union where such work is to be performed and shall be paid to all employees under the terms of this Agreement unless otherwise modified by the National Maintenance Agreements Policy Committee, Inc. Wages shall be paid weekly by check or other legal tender.

When zone type wage structures are provided for in local agreements and are otherwise applicable in the area of the project, the project for the purposes of this Agreement will be considered as if it was within the area of the base zone rate.

ARTICLE IX – Benefits and other Monetary Funds

Welfare Funds, Pension Funds, Apprentice Training Funds and other monetary funds called for in the Local Union Labor Agreement shall be paid in accordance with the Local Union Labor Agreement except that no funds shall be paid on a basis which exceed the straight time and overtime provisions of this Agreement. [G.C.Exh. 4-6.].

ARTICLE VI – Grievances

All grievances shall be filed within ten (10) calendar days after the complained-of event arose. Grievances shall be appealed to the next higher step within ten (10) calendar days after the meeting in the lower step. Settlement of grievances may be arrived at in any step of the grievance procedure which will be final and binding on the Union and Employer.

Grievances, other than those pertaining to jurisdiction or general wage rates on any work covered by this Agreement shall be handled in the following manner:

Step 1. Between the Employer's Supervisor and the Local Union Steward at the job site.

Step 2. Between the Business Representative and the Employer's Supervisor at the job site.

Step 3. Between the International Union Representative and the Supervisor or Labor Relations Manager of the Company.

Step 4. If the parties are unable to effect an amicable settlement of adjustment of any grievance or controversy, such grievance or controversy shall be submitted to the National Maintenance Agreements Policy Committee, Inc. for a decision to become effective immediately.

Step 5. Failure of the National Maintenance Agreements Policy Committee, Inc., to reach a decision shall constitute a basis for a submittal of the question to the American Arbitration Association for a binding decision. In such instances, the affected parties to the dispute shall appoint an arbitrator to review the matter and render a binding decision. If the parties are unable to agree upon an arbitrator, the American Arbitration Association shall make the designation. The affected parties to the arbitration shall equally share in the costs, including printing and publication of any record on such arbitration.

The arbitrator shall only have jurisdiction and authority to interpret, apply, or determine compliance with the provisions of this Agreement. Any award of the arbitrator shall be final and binding upon the Employer and the Union. A copy of the award by the arbitrator shall be submitted to the National Maintenance Agreements Policy Committee as soon after such award is rendered.

There is no dispute that the National Maintenance Agreements Policy Committee, mentioned in the above provisions, is an institution consisting of equal members

of the UA and employers, established for the purpose, inter alia, of resolving grievances flowing from contract disputes.

In addition, at the hearing, Respondents conceded that the following unit of employees is a unit appropriate for bargaining within the meaning of Section 9(b) of the Act:

> All United Association Employees of the Respondent now employed and employed in the future of maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the [Association] [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional supervisory employees as defined in the National Labor Relations Act, as amended.

The recognition clause of the NIMA Agreement (art. I) to which the International Union (United Association) and Respondents are bound specifies, inter alia, that the "[Respondents recognize] the Union herein as duly constituted for the purpose of bargaining collectively and administering this agreement for the members affiliated with the United Association, AFL-CIO." Respondents deny (answer, par. 7; Tr. 51) that the United Association has been the exclusive collective-bargaining representative of Respondents' Ross Brothers and Huntington Piping units. I nevertheless conclude that at all material times the United Association has been and is the exclusive bargaining representative of Huntington Piping's and Ross Brothers' unit employees within the meaning of Section 8(f) of the Act, regardless of its 9(a) status.

A. The Pleadings and Respondents' Concession With Regard to being Bound by the NIMA Agreement

The General Counsel's consolidated complaint alleges with respect to both Respondents (complaint pars. 6(b) and (c)) that each of them granted recognition to the International Union (UA) as the exclusive collective-bargaining representative in the admittedly appropriate unit (complaint par. 5 as modified at the hearing), by entering into a collective-bargaining agreement (NIMA) with the International Union continuing in effect until terminated by 90 days' written notice from either party, all without regard to whether the majority status of the International Union has ever been established under Section 9 of the Act.[5]

Respondents' answer admits only that the Respondents herein entered into the NIMA Agreement with the International Union (UA) but denied all other allegations of the complaint including those asserting that Respondents, by virtue of entering into the NIMA Agreement,

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[5] The General Counsel's complaint also alleges that the International Union enjoys 9(a) majority status. I ignore this allegation as mere confusing surplusage.

As above noted, the NIMA Agreement relating to employers admittedly in the building and construction industry is to be analyzed pursuant to Sec. 8(f) of the Act. Under *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board presumes that parties in the construction industry intend their relationship to be an 8(f) relationship. *Casale Industries*, 311 NLRB 951 (1993). No evidence of an 9(a) relationship was adduced to rebut this presumption. Furthermore, the above-recognition clause refers to employees "employed in the future."

have caused the International Union (UA) to be the exclusive collective-bargaining representative of Respondents' unit employees and that the Respondents were continually bound by the NIMA Agreement having failed to terminate the agreement by the required 90 days' written notice.[6]

In view of the possible ambiguity concerning the respective Respondents' relationship to the International Union (UA), particularly concerning the International Union's exclusive representative status and the continuing obligation of Respondents to recognize the International as such, there was extensive record clarification on these points (Tr. 55-59). By way of clarification, therefore, Respondents, on the record asserted: "We have never denied being bound by the NIMA agreement" (Tr. 57, 58). Thus, the instant case preceded on the assumption that Respondents' concessions concerning being continually bound by the NIMA Agreement, unmodified on the record, remained in full force and effect.

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[6] While it is true that the NIMA Agreement contains a 30-day union-security clause, in the absence of preponderant supporting evidence, I am nevertheless unable to find that the International Union enjoys 9(a) status. I find, as above noted, that at all material times, by virtue of entering into the NIMA Agreement, it is the 8(f) exclusive representative in the admittedly appropriate units. Under *Deklewa*, supra, the agreement, during its term, is not only enforceable, but the parties are subject to Sec. 8(a)(5) of the Act with regard to its obligations.

B. History and Method of Collective Bargaining in the Tri-State Area

In 1969, following a period of labor-management controversy in the Tri-State area (the confluence of southern Ohio, western West Virginia, and northeastern Kentucky), 40 or more area local unions formed the Tri-State Building Trades Council and through it bargained collectively with its counterpart, the Tri-State Building Contractors Association, composed of 25 or more contractors in the construction industry. All 15 building trades, including at least 3 plumbing locals among which was Local 577, were represented on the labor side; the employer side consisting mostly of heavy industrial contractors. Ordinarily six to eight members from each side were formed into subcommittees to negotiate and report back the results of their negotiations. Special problems peculiar to particular trades were worked out by other subcommittees. The process of wage and fringe benefits negotiation consisted of a wage committee on each side deciding ordinarily on increasing the wages and benefits from the prior contract (Tr. 276). After the council and the Association reached agreement on wages and benefits, individual local labor organizations would bargain in other subcommittees of the Building Trades Council and reach individual agreements pertaining only to the local union with regard to matters other than wages and benefits. The wages and benefits, already agreed upon in prior bargaining, would then be "plugged" into the local union agreements.

In 1986-1987 bargaining, Local 577 reached agreement on individual contractual matters (with wages and fringes merely "plugged" in) with a group of mechanical

contractors, the Southern Ohio Mechanical Contractors Association. The bargainers for this Southern Ohio Association, all members of the Building Trades Contractors Association, executed a 3-year agreement effective June 1, 1987 (G.C.Exh. 5). Respondents Huntington Piping, Inc. and Ross Brothers Construction Co. were separately bound (C.P.Exhs. 3 and 4). There is no dispute that this local agreement, containing wages, benefits, and other terms and conditions of employment is the local agreement referred to in the NIMA Agreement, "Article VIII-Wages," which, as above noted, provides:

> Wage rate shall be those as set forth in the current labor agreement of the affiliated Local Union where such work is to be performed and shall be paid to all employees under the terms of this [NIMA] agreement unless otherwise modified by [NMAPC].

This 3-year agreement between the Southern Ohio Mechanical Contractors Association and Local 577 (G.C.Exh. 5) expiring by its terms on May 31, 1990, was thereafter extended for 1 year to June 1991 and thereafter to May 31, 1992. The wage rates, at the time of 1992 expiration, were $19-per-hour wages; $1.30 local pension; $1.10 national pension; and $2.34 in health and welfare. Thus, a total of $4.74 per hour in fringe benefits beyond the $19-per-hour wages.

Under the terms of the NIMA Agreement, whenever a contractor comes into the nine county, south Ohio Local 577 area, he may, if he desires the advantages of the coverage of the NIMA contract and desires to use Local 577 members for his plumbing function, seek NIMA coverage of his contract. Once NIMA coverage is permitted

by the International Union, the contractor working within the jurisdictional area of Local 577 pays the wage rates set forth in the existing labor agreement negotiated by Local 577. Contractors coming into the area, therefore, whatever other bargaining functions they may engage in do not bargain with Local 577 concerning wages and benefits. NIMA contract coverage automatically obligates them, as above noted, to pay the existing, negotiated wage structure in the Local 577 contract. Thus, all competing contractors under NIMA contract coverage face the same contract terms in Local 577's jurisdiction whether or not they are individually bound.

In or about March 1991 the Tri-State Building Contractors Association and the Tri-State Building Trades Council, in the presence of an agreement to expire May 31, 1992, agreed to meet for the purpose of deciding whether to open the terms of the contract over a full year prior to expiration so that the terms of a newly negotiated agreement would further extend the contract for a period of 3 additional years (Tr. 484), from June 1, 1992, through May 31, 1995. In meetings of subcommittees from both sides, it was agreed, in this setting, that participation by an individual local in these multicraft negotiations through the Building Trades Council did not signify that it would be bound to continue in the negotiations or be bound by the product of the negotiations (Tr. 485-486). It was agreed that any party could merely give notice to the opposing party that it would no longer continue in the negotiations or be a party to any ultimate agreement. Thus, every local union and every contractor had the option, at any time, of "either going with that [contract negotiations] . . . staying in it or dropping out." (Tr. 314:

327.) In particular, every local union had the right to return to its constituency and proceed to the ratification process. If there was no ratification, the union could drop out of further bargaining and not be bound by its results. It could simply "walk away" from further bargaining (Tr. 485).

After these March and April 1991 reopened meetings (which continued thereafter and resulted in an August 1991 3-year wage and benefit agreement between the two bargaining groups), Local 577 Business Agent Prater returned to his membership in May 1991, for the purpose of voting to reject or accept the Building Contractor Association's offer of a 3-year extension commencing June 1992. The Local 577 membership voted on the Tri-State Building Contractors' offer of $3.62-per-hour increase over the proposed 3-year period. The membership voted to reject the offer. Prater testified that Local 577 rejected the Tri-State offer because Local 577 was attempting to reach parity with the pay rates and benefits of other trades, particularly the boilermakers who, performing similar work, were paid at higher rates than Local 577 members. In addition, Prater further testified that 10 of 17 Ohio Plumber Locals had higher pay rates than Local 577. In any event, as noted, in May 1991, the Local 577 membership rejected the Tri-State wage and benefit offer.

At a meeting of the Tri-State Building Contractors and Tri-State Trades Council, in early June 1991 (Tr. 490-491), Prater told the Tri-State Building Trades Contractors that Local 577 had rejected the proposed 3-year contract extension and would withdraw from bargaining

through the Building Trades Council ("multicraft" bargaining, Tr. 391). It would comply with the current contract until expiration, May 31, 1992 (Tr. 491). It was not until the following year, March 4, 1992, that, pursuant to the 60-day notice requirement in the expiring agreement (G.C.Exh. 5), Local 577 formally notified both the Tri-State Building and Construction Trades Council and the Tri-State Contractors' Association that it was withdrawing from the Tri-State Trades Council which would no longer be its bargaining agent (G.C.Exh. 6).

Having formally withdrawn on March 4, 1992, from bargaining through the Trades Council with the Tri-State Building Contractors, Local 577, on March 6, 1992, notified the Mechanical Contractors Association of Southeastern Ohio that it was ready to negotiate a contract with that Association on March 10, 1992 (G.C.Exh. 7). Following bargaining sessions of March 10 and 12, the new Association and Local 577 entered into a 5-year collective-bargaining agreement effective June 1, 1992, to May 31, 1997 (G.C.Exh. 8).[7] After it was executed, as

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[7] The Southeastern Association (not the Southern Ohio Mechanical Contractors Assn., which was the employer group executing G.C.Exh. 5 was composed of six business enterprises, the ownership of four of which was lodged in essentially two individuals, Daryl Stapleton and Bobby Evans. The employers who signed the expired contract on behalf of the Southern Ohio Mechanical contractor Association, as distinguished from the Southeastern Ohio Association, were Jack Stapleton, the deceased father of Daryl Stapleton, and Bobby Evans. Daryl Stapleton and Bobby Evans had membership cards in Local 577. If they abandoned the contracting business or worked less than 50 percent as contractors they could be referred out by Local 577 as journeymen plumbers from the bottom of the eligibility list.

many as 30 contractors signed the new agreement and complied with it. The only employers who have failed and refused to comply with it are the two Respondents herein. The new contract, for the first time, established the "industrial rate" at $2.12 per hour higher than a new "commercial" rate. The industrial rate, in the first year, was raised by $3.09 per hour.

C. *Respondents' Response to the New Contract and its New Rates*

At least as early as April 8, 1992, Respondents were aware of the new rates in the new contract. On that date, Respondents authorized their bargaining representative, the Tri-State Contract Association, to protest to the Building Trades Council the total $3.09 per hour first year contract wage increase followed by additional increases of $1 per hour in the second and third year (C.P.Exh. 1). The thrust of the letter protested the large wage increases; the bad effect on the contracting business in the Tri-State area; and questioned why Local 577 would "drop out of our multi-craft negotiations since your Local Union No. 577 has a 16-year historical long-standing bargaining relationship with the Tri-State Contractors Association multi-craft unit?" (C.P.Exh. 1.) The letter emphasizes that Prater had actively represented Local 577 in two meetings with the Tri-State Contractors' Association in March and April 1991. It also questioned Local 577's good-faith bargaining since it was bargaining with two different employer groups at the same time.

D. Respondent Ross Brothers Construction and the New Contract

Sometime on or about June 8, 1992, Prater sent both Ross Brothers and Huntington Piping copies of the new contract (G.C.Exh. 8) containing the new wage rates. As noted hereafter, Respondent Huntington Piping paid the new wage rates for a 2-week period after June 1, 1992, the effective date of the new agreement. This matter will be dealt with separately.

Sometime after June 1, 1992, Local 577 members working for Ross Brothers Construction told Business Agent Prater that they were being paid at the wage rate under the old agreement (G.C.Exh. 5) rather than the new contract wage rates (G.C.Exh. 8) (Tr. 133). Prater then telephoned Ross Brothers' president, Morris Griffiths. When Prater asked him if he was going to pay the wages under the new agreement, Griffiths told them that he would not and that he would have nothing to do with the new agreement (Tr. 135-136).[8]

On June 8, 1992, Griffiths, on behalf of Respondent Ross Brothers, wrote to NIMA's grievance-adjustment

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[8] The new contract, aside from the substantial direct wage increase and the creation of the higher wage rate for industrial, as opposed to commercial, plumbing work, also changed the method of calculating fringe benefits. The new contract required payment of fringe benefits for hours paid rather than hours worked, thus requiring payment of benefits at a time-and-a-half rate rather than a straight time rate for hours worked over 8 hours per day (Tr. 137). There were also changes in the apprenticeship ratio, travel pay, and the obligation to supply tools (Tr. 137).

arm, NMAPC, the National Maintenance Agreement Policy Committee, protesting, in particular, the wage increase included in Local 577's collective-bargaining agreement with the Southeastern Contractors Association:

> Gentlemen:
>
> Ross Brothers Construction Company strenuously objects to the proposed wage increase requested by Local 577 U.A. of Portsmouth, Ohio which covers the subject site.
>
> Local 577 has not signed a contract with the Tri-State Contractors Association which has been the historical bargaining group with Local 577 over the last 15 to 20 years.
>
> We received in the mail this morning (6-8-92), a wage breakdown for contractors signatory to Local 577's agreement. To my knowledge none of the members of the Tri-State Contractor Association are signatory to this agreement.
>
> This proposed wage package represents an increase this year of $3.09, whereas all other local unions, 22 of which are members of the multi-craft bargaining unit and another 34 locals who have affiliation with the Tri-State Building Trades Council have agreed to approximately $1.50 plus the drug testing fee of .12 per hour for this coming year.
>
> It is interesting to note that in the proposed wage increase for this year for the Local proposed Commercial agreement calls for a wage rate of 2.12 less than the Industrial rate.

It is not a coincidence that applying the 90% modifier to the proposed industrial rate results in the approximate amount of the proposed commercial rate. It has been quoted to our office by a local contractor in Portsmouth that the purpose of the 3.09 increase was to circumvent the effect of the NMAPC modifier. I would estimate that the vast majority of the work done by this Local is done under the NMAPC Agreement.

All of the other local unions in the area, including two U.S. Locals 521 and 248 have agreed to a reasonable increase in order to preserve industrial work for the Building Trades. It does not seem correct or fair to the local construction industry for one local to feel that they are better than every one else and demand an exorbitant increase.

In lieu of being able to roll back the proposed increase we would respectfully suggest that an 80% modifier be applied to this Local in order to obtain parity.

The history of this situation is as follows: Approximately one year before the expiration of the local Multi-Craft Agreement (5-31-92) the Contractors Association entered into negotiations to extend the agreements to 3 years beyond the expiration date of May 31, 1992. Committees from labor and management were established to try to accomplish the extension and implement a drug testing program. Phil Prater, Local 577 agent was a very outspoken member of the labor committee and was a leader in the negotiation. Apparently, after several months negotiations & the agreement was being finalized, Mr. Prater did not like what was

negotiated and decided to withdraw and negotiate with three Portsmouth, Ohio Contractors (2 plumbers and a fabricator) all of whom to our knowledge are members of Local 577. The resultant agreement is the outcome of those negotiations and not as a result of the traditional bargaining group. Whether or not labor law was violated in this situation remains to be seen.

As it stands, all other locals have agreed to approximately 1.50, 1.00 and 1.00 over the next three years while the proposed Local 577 Agreement reflects 3.09, 1.25 and 1.25.

We would appreciate your doing whatever is possible to bring this local in line with the remainder of the Building Trades crafts in the area.

At present, we are paying the old rate and will do so until advised differently by the committee.

On July 7, 1992, Ross Brothers wrote directly to Local 577 regarding Local 577's obligation under the NIMA Agreement and that Ross Brothers had already protested the terms of Local 577's new contract under NIMA, the protest having been referred to the NMAPC Committee for resolution (G.C.Exh. 10):

Your letter of July 3 was received this date July 7, 1992. Our comments are as follows:

1. We are working under an NMAPC Agreement at the Haverhill, Ohio.

2. Any and all disputes as to the administration of this contract are under the jurisdiction of the NMAPC.

3. Your blatant attempt to discriminate against industrial contractors and users has been referred to the NMAPC for resolution.

4. Pipefitters labor for this site is supplied by your local to this site under the terms of the National Maintenance Agreement and not a local agreement.

5. Any slowdown or work stoppage on this project would be a violation of the National Maintenance Agreement, particularly when the subject has been referred to the committee for resolution.

6. It is also our understanding that if certain craft labor is withheld from the jobsite, work may proceed with the crafts that are on the jobsite.

Your continued opinion that you are better than all other crafts in the area can only cause dissension and will work to the detriment of the Building Trades construction industry.

At no time after Local 577's notice of withdrawal of bargaining rights from the Tri-State Council did Tri-State Building Contractors or Respondents request Local 577 to terminate or modify Respondents' NIMA obligation to pay the wage rates established by Local 577 in the new contract. Nor did Local 577 agree with the Respondents to permit their paying pre-June 1, 1992 wage rates to Local 577 members or unit employees. Moreover it was stipulated that the Respondents, except Huntington Piping for a 2-week period, continue to pay the wage and benefit rates specified in the expired contract on NIMA-obligated projects (G.C. Exh. 5) at all times through the date of the hearing.

Furthermore, there is no dispute that foreign plumbing contractors working in Local 577's jurisdiction, under established procedure, regularly contacted the International Union (UA) and requested the extension of the coverage of the NIMA contract to particular jobsites therein. The International Union, according to this procedure, then notified the contractor that the job was in Local 577's jurisdiction in southern Ohio and that the foreign contractor was obligated to contact Business Manager Phillip Prater. In the period June 1, 1992, through May 1993, approximately 30 to 35 "foreign contractors" coming into Local 577's jurisdiction submitted to the terms of and signed the new contract (G.C. Exh. 8). There have been no wage rate changes allowed to them nor were there negotiations for different rates. Respondents concede that, as to these "foreign" contractors, the Local 577 new contract with the Southeastern Contractors Association is valid (Tr. 175-177). Lastly, Respondents concede that they ordinarily pay local plumbing union contract wage and benefit rates in other jurisdictions in which they work where the job is under the NIMA Agreement (Tr. 318). In such situations, the Respondents may not have participated in negotiations leading to the local contract.

In any event, 1 week after Respondent Ross Brothers vigorously complained to the National Maintenance Agreement Policy Committee (NMAPC), established by the NIMA Agreement, concerning the wage increases and other terms and conditions of the new Local 577 contract (G.C. Exh. 9), Business Manager Prater, on June 15, 1992, similarly complained (G.C. Exh. 13) of Ross Brothers' refusal to abide by its NIMA obligation: to pay, on NIMA-

covered jobs, the wages specified in the Local 577 contract as required by the wage-obligation section (Art. VIII – Wages) in the NIMA contract (G.C. Exh. 4). Actually, Business Agent Prater addressed a letter to the International Union's president requesting that the International Union (the actual party to the NIMA grievance-adjustment committee, NMAPC) bring the matter of Ross Brothers' refusal to pay the new contract wage rate before the NMAPC committee. In so doing, Prater specifically requested "assistance on this grievance, step IV of the National Maintenance Agreement Policy Committee" NMAPC has formally acted upon neither Ross Brothers' June 8, 1992 complaint against Local 577 (G.C. Exh. 9) or Local 577's June 15 complaint (G.C. Exh. 13) to its International Union to present the Ross Brothers alleged default to the committee.[9]

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[9] Over Respondents' objection, I admitted in evidence a July 10, 1992 inter office memorandum, on stationery of the International Union (UA) (G.C. Exh. 14), a copy of which was sent to Local 577. This memorandum, from the International Union's representative on the NMAPC committee to another International Union representative, referred to a meeting of the NMAPC labor section on July 1, 1992, regarding Local 577's recent contract including the wage increase. The text of the memorandum is:

> The Labor Section discussed Local 577's newly negotiated wage package effective June 1, 1992 with a $3.09 wage increase in the first year. After much discussion it was agreed that no action could be taken by the N.M.A.P.C. as it was not within our power to rule on, or get involved in local collective-bargaining negotiations.

As I noted at the hearing, I regard this interoffice memorandum as hearsay; not binding on Respondents and

E. *Respondent Huntington Piping, Inc.*

While Ross Brothers' main office is in Kentucky, Huntington Piping works out of Huntington, West Virginia. Both Respondents are industrial contractors in Ohio, Kentucky, and West Virginia. They are competitors.

In June 1992, while working on a job for Dow Chemical Company, Huntington Piping paid the higher wage rates under the new contract for a period of 2 weeks. Dow Chemical then advised Huntington Piping that it would not reimburse Huntington for the higher wage rates. At that point, Huntington Piping returned to paying the old rate and wrote several letters to Local 577 (G.C. Exh. 11 and 12). These letters, in substance, requested that Local 577 enter into negotiations for a new contract. Business Manager Prater never directly refused to negotiate a new contract with Huntington Piping; rather, Local 577 sent monthly letters insisting that Huntington Piping continually made mistakes on computation of the rate of fringe benefits. On each such occasion, Huntington Piping declared that it was trying to negotiate a new contract. Like Ross Brothers, Huntington Piping continues to pay its plumbing employees at the "old rate" in the expired contract (G.C. Exh. 5) rather than the rates under the new contract (G.C. Exh. 8).

Like Ross Brothers, NMAPC has never contacted Huntington Piping regarding the June 15, 1992 grievance

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certainly not an official act of the NMAPC which would be a dispositive action of that organization binding Respondent Ross Brothers.

filed by Prater regarding the failure of contractors to pay the rates established in the new contract.

Discussion and Conclusions

The Prima Facie Case With Regard to Both Respondents

Respondents concede that not only are they bound by the NIMA Agreement (Tr. 55-58) but that they would pay the new wage rates established in the new contract (G.C. Exh. 8) if directed to do so by NMAPC. Neither Respondent is a signatory of Local 577's new contract.

Articles VIII – Wages in the NIMA Agreement (G.C. Exh. 4), as above noted, provides:

> Wage rates shall be those as set forth in the current Labor Agreement of the affiliated Local Union where such work is to be performed and shall be paid to all employees under the terms of this agreement unless otherwise modified by the National Maintenance Agreements Policy Committee Inc.

Both Respondents had failed and refused to pay those wage rates notwithstanding their concession that they are bound by the NIMA contract including the provision with regard to wages.

Under the long-established Board Rule set forth in *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, enfd. 505 F.2d 1302, cert. denied 423 U.S. 826; *Fort Pierce Jai-Alai*, 310 NLRB 862 (1993), an employer, notwithstanding that he is faced with a dire financial crisis which would close his operations, may not refuse to pay the wage rates established in a valid collective-bargaining contract. In

rejecting the employer's defense that its action in unilaterally reducing the wages in the face of dire economic consequences, at most, was a breach of contract to be remedied by the courts, the Board held that:

> . . . clear repudiation of the contract wage provision is not just a mere breach of the contract, but amounts, as a technical matter to the striking of a death blow to the contract as a whole, and is thus, in reality a basic repudiation of the bargaining relationship.

The Board observed that, under the unambiguous language of Section 8(d) of the Act, explicitly forbidding midterm modification of a contract's wage provision without the consent of the union, the employer's good-faith motivation in seeking to preserve its own existence was irrelevant.

Furthermore, relevant to the instant case, the Board rejected the Employer's plea that the alleged violation be deferred to the contractual grievance-arbitration procedure because the Union had invoked that procedure before it filed the charge. In that case, then Chairman Miller refused to defer under *Collyer Insulated Wire*, 192 NLRB 837 (1971), because deferral was inappropriate absent a claim or finding that *any* of the contract terms even arguably authorized the employer's unilateral refusal to pay the contract wage rates.[10]

Under these conditions, with Respondents admittedly being bound by the NIMA obligation to pay the

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[10] The other two members of the Board would refuse to defer because of their general disagreement with the Collyer deferral doctrine, *Oak Cliff-Golman Baking Co.*, supra at 1063.

wage rates established in the Local Union's collective-bargaining agreement, I conclude that there was a prima facie case of repudiation of the NIMA contract obligation to pay the Local 577 wage rate (incorporated in the NIMA contract Art. VIII – Wages) on any job on which Respondents were granted NIMA contract coverage; and that such failures to pay the wage rates under the new contract (G.C. Exh. 8) come squarely within the violation of Section 8(a)(5) established in *Oak Cliff-Golman Baking Co.*, supra, i.e., a repudiation of the contract wage provision constitutes a repudiation of the collective-bargaining relationship. I conclude, therefore, that as a prima facie matter, Respondents thereby violated Sections 8(d) and 8(a)(5) and (1) of the Act as alleged. It is no defense that Respondents stand willing to bargain with Local 577 on the wage and benefit rates. *Fort Pierce Jai-Alai*, supra.

The Defenses

Ross Brothers' Defenses

The pleadings, and Ross Brothers' position at the hearing, demonstrates that Respondent Ross Brothers advances two basic defenses to the prima facie case:

(1) That the contract between Local 577 and the Southeastern Ohio Contractors; Association is *invalid* because (a) it was not bargained in good faith or at arms' length with the Southeastern Contractors Association; and (b) in any event, Local 577 is bound by the multicraft contract extended by the Tri-State Building Contractors and the Tri-State Building Trades Council in August 1992 for a 3-year period. This result is based upon the long bargaining history of Local 577 through the Tri-State

Building and Construction Trades Council and its continuing bargaining with and through that organization as late as the March and April 1991 bargaining for the preexpiration extension of the existing contract (G.C. Exh. 5).

(2) Further, Respondent Ross Brothers urges that both its own June 8, 1992 complaint or grievance and the Union's June 15 grievance, both to NIMA, both concerning Ross Brothers' *obligation* to observe the new Local 577 wage rates, are still pending before NMAPC, and that since NMAPC has not acted in the matter, a finding of *repudiation* by Ross Brothers is premature. Thus, it is argued, that no 8(a)(5) violation may be perfected under the theory of Ross Brothers' repudiation of its NIMA obligation to pay the new wage rates until the obligation is established through NMAPC action denying Ross Brothers' grievance and/or granting Local 577's grievance. Cf. *Dubo Mfg. Co.*, 142 NLRB 431, 432 (1963).

With regard to the first discernible defense, that the new contract was not negotiated in good faith or at arm's length, Respondents observed that the number of employees employed by the six contractor-members of the Southeastern Association is small; that there are only really four principals acting under the mask of six contractors; that certain of the contractors are not exclusively engaged, like Ross Brothers, in industrial plumbing but are installers of commercial plumbing; that the principal negotiators of the new contract on behalf of the Southeastern Contractors' Association hold membership cards in Local 577; and that such contractors who are members of Local 577 may be referred out as journeymen plumbers if they find that such work is to their financial advantage.

There has been no evidence adduced that any of these six contracting organizations or their four principals are not engaged, in large part, in industrial plumbing contracting. The fact that some or all of them are also engaged in the installation of commercial type plumbing does not seem dispositive. Respondents are not engaged in commercial plumbing and are therefore free of the commercial rates. The NIMA Agreement specifies coverage of those employers, like Respondents, engaged in construction work, maintenance, repair, and renovation of industrial facilities (G.C. Exh. 4, p. 1). Similarly, nothing in the NIMA Agreement (or the statute) suggests that the size of the contractor or the number of employees he employs on particular jobs governs his eligibility to contract with Local 577 in establishing a lawful local wage rate. Nor is there any suggestion or proof in this record that the contractors' retention of Local 577 membership cards is of disabling significance. The only evidence of record regarding their ability to work as journeymen plumbers is that if they abandon or severely limit their contracting function, they be [sic] referred out from the bottom of the Local 577 eligibility list. It is not a statutory violation, nor here a contract violation, for member-contractor to sign a collective-bargaining agreement with the union.[11]

There is no evidence in this record to suggest any discriminatory motive, discriminatory application of the new contract (G.C. Exh. 8), or conflict of interest. More than 30 contractors have signed the new agreement and

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[11] *Sheet Metal Workers Local 104 (Brisco Sheet Metal)*, 311 NLRB 99 (1993).

Respondents concede that "foreign" contractors have signed the new agreement and that foreign contractors working in the area would be bound by that agreement. There is no evidence of a lack of arm's-length relationship or any suggestion that the wage rates or other terms or conditions of employment specified in the new contract would be discriminatorily applied against either of the Respondents. The speed of execution and prior negotiations leading to the new contract does not constitute evidence of bad faith, discrimination, or overreaching.

Ross Brothers' most particular complaint, obvious on the record, is that the wage rates and benefits are too costly and will inhibit the business of construction and repair of plumbing facilities in the Tri-State area. I conclude, nevertheless, that there is no showing of a lack of bona fides in the negotiation and execution of the new contract. Ross Brothers' concern for the inhibitory effect of the higher wage rates may be justified. It is, however, no defense to Respondents' conduct. *Oak Cliff-Golman Baking Co.*, supra.

Respondent Ross Brothers' second defense is that Local 577, through Business Manager Prater, is bound by the Building Trades Council's multicraft agreement of August 1991 extending the Tri-State agreement for 3 years. This allegedly results from Prater's participation in the Building Trades Council's March and April 1991 bargaining with Building Contractors which led to the August 1991 extension; the history of Local 577 bargaining through the multicraft Building Trades Council; and Local 577's failure to withdraw bargaining rights from the Building Trades Council until March 1992.

The Charging Party, in particular, opposes this defense on the ground that the timeliness of the withdrawal should be measured by the expiration of the pre-existing contract (G.C. Exh. 5, May 31, 1992 expiration) and not by the participation of Local 577 in negotiations concerning a reopener (compare Tr. 295 with 296-297).

I find, however, that this defense in any event must be rejected. With regard to the timeliness of Local 577's withdrawal of bargaining rights from the Building Trades Council, and the consequences of its participation in such reopener-bargaining in March and April 1991 those matters are disposed of by referring to the explicit agreement of the parties. The parties agreed according to the testimony of both Prater and Ross Brothers' president, Griffiths, that the bargaining on the reopener of the existing contract was on the explicit condition that any party participating in the March and April 1991 bargaining was free of any obligation to continue bargaining and had the option of merely "dropping out" of the negotiations upon notice thereof. There was no requirement that the notice be written.

The evidence in this record, based upon Prater's uncontradicted and credited testimony, is that following Local 577's May 1991 rejection of the terms offered by Tri-State Building Contractors, Prater informed Tri-State Building Contractors in June 1991 that Local 577 was withdrawing from multicraft bargaining through the Building Trades Council, but would comply with the terms of the existing contract until expiration on May 31, 1992, some 11 months thereafter (Tr. 491). Indeed, in

order to emphasize its June 1991 notification of a withdrawal of bargaining rights during these reopener negotiations, Local 577 agreed to accept only the remaining 50-cent-per-hour increase in wage rates applicable to the final year of the expiring contract and refused to accept an additional 50-cent-per-hour wage increase offered by the Building Contractors Association to Local Unions denoting continued participation in bargaining and acceptance of the 3-year extension under the reopened negotiations (Tr. 295-297).[12]

Insofar as the timeliness and unequivocal nature of withdrawal from bargaining through the Building Trades Council are concerned, all that *Retail Associates*, 120 NLRB 388, requires is that the withdrawal be timely and unequivocal. In the instant case, the parties were not concerned, in March and April 1991, with the expiration of the contract on May 31, 1992, more than 14 months thereafter. I find that Prater's June 1991 *oral* notification of both the Tri-State Building Trades and the Tri-State Building Contractors Association that Local 577 would not renew its bargaining through the Building Trades Council, would withdraw from such bargaining, and would not agree to the terms of the new contract, together with the subsequent March 4, 1992 60-day written notification (pursuant to the terms of the existing contract) of withdrawal of bargaining rights (G.C. Exh. 6) constitute the timely and unequivocal notification of

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[12] The Charging Party observes that Respondents never urged, as a defense, that Local 577 was bound by the August 1991 3-year extension until this hearing.

withdrawal of bargaining rights and nonparticipation as required by the *Retail Associate's* rule, supra.[13]

On the other hand, Local 577 not only withdrew bargaining rights from the multicraft Building Trades Council, but ceased bargaining through it, or by single bargaining, with the Tri-State Building Contractors Association and then ceased recognizing the Contractors Association. Nothing in this record, however, demonstrates that the Building Contractors Association was the employer with whom Local 577 was *obligated* to bargain. Nor, certainly for reopener purposes, were Respondents obligated to continue bargaining with the Building Trades Council. It was the International Union that was the statutory labor organization recognized by Respondents as the collective-bargaining agent to whom they were obligated under NIMA-covered projects. Multicraft bargaining in which Local 577 and Respondents engaged through their respective multiunion, multiemployer agencies, for purposes of the NIMA Agreement, was merely a convenient bargaining device through which wages and benefits could be determined. Such bargaining was hardly the only mechanism for determining wages.

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[13] See *S. Freedman Electric*, 256 NLRB 432 fn. 2 (1981), enfd. mem. 679 F.2d 873 (2d Cir.1981). Any requirement that the notice be *written* is fulfilled by Local 577's timely written 60-day notice (G.C. Exh. 6) of formal withdrawal from bargaining through the multicraft Building Trades Council sent to both the Building Trades Council and the Building Contractors Association, prior to May 31, 1992 contract expiration. The *oral* notification of June 1991 satisfies the agreement and practice of the parties where bargaining relates merely to premature extension during reopened bargaining.

Such bargaining, being consensual, was subject to rearrangement and change under *Retail Associates*, supra. We are here dealing only with the question whether Local 577 lawfully established a local union wage rate for purposes of the NIMA Agreement, "Article VIII-Wages." Assuming, arguendo, that there was any statutory obligation on Local 577 to bargain through the Building Trades Council, I conclude there was timely and unequivocal *Retail Associates* withdrawal by Local 577 from the Building Trades Council.

There remains, however, the question whether Local 577 was under a statutory obligation to thereafter recognize and bargain on a single basis with the Tri-State Building Contractors' Association. I conclude that Local 577's March 4, 1992 written notification to the Tri-State Biding [sic] Contractor's Association (G.C. Exh. 6) meets the requirements concerning withdrawal of recognition imposed by *John Deklewa & Sons*, 282 NLRB 1375, enfd. sub. nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.1988), cert. denied 488 U.S. 889 (1988). The Board Rule, with regard to termination of the obligation to recognize and bargain with an employer in the construction industry under an 8(f) contract[14] is that, upon expiration of the agreement, not only does the signatory union

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[14] There is no question that, on this record, the Respondents are in the construction industry and that the intent of the parties was to enter into a contract (the NIMA Agreement) subject to the provisions of Sec. 8(f) of the National Labor Relations Act. The two Local 577 agreements (G.C. Exhs. 5 and 8) are also 8(f) agreements. Under *Deklewa*, supra, the Board presumes that parties in the construction industry intend their relationship to be an 8(f) relationship. Thus, the burden is on the party who seeks to show the contrary, i.e., a Sec. 9 relationship. Casale

enjoy no presumption of majority status, but either party may repudiate the 8(f) bargaining relationship and withdraw recognition from the other party absent demonstration of majority status by the union prior to the time of repudiation, or through voluntary recognition. The Union, like Respondents, similarly would be free to repudiate the 8(f) contract and repudiate the bargaining relationship, if any. No evidence demonstrating voluntary recognition or majority status was adduced. I therefore conclude that Local 577, through its written notification to the Building Contractors Association on March 4, 1992, not only freed itself from the terms of any succeeding contract, but lawfully repudiated the bargaining relationship, if any, with the Tri-State Building Contractors Association.

Respondents Ross Brothers' Deferral Defenses

A. *Use of the NIMA Grievance Procedure*

Upon Respondent Ross Brothers refusal to pay its plumbers according to the new wage rates in the Southeastern Association contract (G.C. Exh. 8), and after Local 577, in early June 1992, served on Ross Brothers a copy of the wage rates in the new contract, and demanded compliance therewith, Ross Brothers, on June 8, 1992 immediately complained to NMAPC concerning (a) the size of the wage increase in the new contract; (b) Local 577's abandonment of multicraft negotiations and late withdrawal from bargaining with the traditional bargaining

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Industries, supra, 311 NLRB 951. There is not evidence rebutting the presumption.

group (Building Contractors Assn.) apparently in violation of labor law; and (c) a request for NMAPC "doing whatever is possible to bring this local [Local 577] in line with the remainder of the building trade crafts in this area. At present we are paying the old rate and will do so until advised differently by the committee" (G.C. Exh. 9).

A week later, on June 15, 1992, Local 577 similarly petitioned its International Union, requesting its assistance "on this grievance, step IV of The National Maintenance Agreements Policy Committee [concerning Ross Brothers Construction Co. refusal] to pay the wage increase effective June 1, 1992. This Local Union and The Southeastern Ohio Mechanical Contractors Association, having negotiated a 5-year agreement June 1, 1992 to May 31, 1997" (G.C. Exh. 13). It is clear, therefore that both parties appealed under NIMA concerning the contractual right of NMAPC to enforce or set aside or modify the terms of the new contract (G.C. Exh. 8).

As above noted, there are two articles of the NIMA Agreement (G.C. Exh. 4) that are pertinent to the evaluation of this "deferral" defense: (1) In article VIII (wages), the NIMA Agreement obligates the employer to pay the wage rates "as set forth in the current Labor Agreement of the affiliated Local Union where such work is to be performed . . . unless otherwise modified by [NMAPC]." (2) On the other hand, by article VI (grievances), the grievance machinery of the NIMA agreement is apparently not available to contesting wage rates. Thus, as noted, the NIMA Agreement, inter alia, provides:

> Grievances, other than those pertaining to jurisdiction or *general wage rates* on any work covered by this agreement shall be handled in the following manner [emphasis added]:
>
> Step 1. . . . .
>
> Step 2. . . . .
>
> Step 3. . . . .
>
> Step 4. If the parties are unable to effect an amicable settlement of [sic] adjustment of any grievance or controversy, such grievance or controversy shall be submitted to [NMAPC] for a decision to become effective immediately.
>
> Step 5. Failure of [NMAPC] to reach a decision shall constitute a basis for a submittal of the question to the American Arbitration Association for a binding decision. . . . The affected parties to the arbitration shall equally share in the cost, including printing and publication of any record of such arbitration.
>
> The arbitrator shall only have jurisdiction and authority to interpret, apply or determine compliance with the provisions of this Agreement.

As will be seen hereafter, it is actually unnecessary to decide whether the parties, or either of them, have properly raised a "grievance" within the contractual framework of the NIMA Agreement or whether the complaints of the parties, even if not technically recognizable "grievances," are or should be amenable to a deferral policy of the Board. For in either case, I conclude that, for similar policy reasons, there should be no deferral by the Board.

The first question, of course, is whether the grievance procedure in article VI of the NIMA Agreement is applicable at all. For it is only grievances "other than those pertaining to jurisdiction or general wage rates" which are susceptible to the NIMA contract grievance procedure. In turn, that raises the question whether "general wage rates,"[15] excluded from the grievance procedure in article VI (grievances), is the same or the equivalent of "wage rates" (art. VIII – wages). Under the NIMA Agreement, the employer is obligated to pay the "wage rates" established in the current labor agreement of the Local Union. Although there might arguably be a difference between wage rates and general wage rates as used in the two articles, yet in the absence of evidence, even argument, to the contrary, I conclude that there is no difference.

The exclusion of general wage rates from the grievance procedure, along with grievances "pertaining to jurisdiction," evidently derives from the desire by NIMA parties to avoid using the grievance procedure to second-guess the wage rates established by the Local Union. This exclusion, I conclude, avoids having NMAPC sit as an

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[15] As noted, above, the grievance procedure also excludes grievances "pertaining to jurisdiction." The NIMA Agreement, article I (recognition), recognizes that certain other jurisdictional dispute settlement procedures in the industry are not applicable to the work covered by the NIMA Agreement. By the terms of article I (recognition), jurisdictional disputes under this contract are referred to the respective general presidents of the Unions for resolution with representives [sic] of the employer who awarded the work permitted to participate. Ultimate resolution is by an impartial third party.

appellate tribunal hearing potentially endless grievances on allegedly unfair wage rates established by Local Unions with employers among whom the complaining contractor was not represented. Thus, the grievance procedure (art. VI), I conclude, is available neither to protect or enforce Local 577's wage rates notwithstanding that Local 577 explicitly attempted to invoke this NIMA grievance procedure (G.C. Exh. 13, June 15, 1992) because of Respondent Ross Brothers' refusal to pay the newly negotiated wage increase and notwithstanding that Respondent Ross Brothers presented the same matter generally to NMAPC when it "strenuously objected to the proposed wage increase requested by Local 577" (G.C. Exh. 9, June 8, 1992). I conclude that deferral be denied because the issue, having been clearly excluded, is not even arguably covered by the contract grievance procedure (and its arbitration provision). Cf. *The Developing Labor Law,* 1032 (3d ed.), and cases cited therein; *Oak-Cliff Golman Baking,* supra.

Furthermore, even if the wage rates were grievable, as the parties attempts suggested, I would conclude that the parties, particularly Respondent Ross Brothers, failed to comply with step 5 of the grievance procedure. Again, step 5 of the grievance procedure (G.C. Exh. 4, p. 5) provides that the failure of NMAPC to reach a decision "shall constitute a basis for a submittal of the question to the American Arbitration Association for a binding decision." There can be no question that the parties' "grievances" were submitted no later than on or about June 8 and 15, respectively (G.C. Exhs. 9 and 13). Between June 1992, and at least through the date of the instant hearing ending May 20, 1993, there has been no disposition by

NMAPC.[16] Thus I conclude, the failure of NMAPC to act in an 11-month period establishes the predicate, under step 5 of the grievance procedure, that there has been a *failure* of NMAPC to reach a decision. Such a *failure* constitutes the basis for submittal of the question to the American Arbitration Association for a binding decision. There has been no such submission to the American Arbitration Association on the record made before me.

The final question, assuming arguendo, that the grievance procedure is applicable at all, is upon whom to cast the burden of proceeding to the American Arbitration Association pursuant to step 5. Since I reach a similar conclusion, below, in the discussion, where it is assumed that the formal grievance procedure does not apply, I shall refer to the reasoning in that discussion in disposing of the instant issue: on whom to place the procedural burden of submission to the American Arbitration Association. In short, I place the burden on Respondent Ross Brothers rather than on the Union for the reasons outlined below.

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[16] As above noted, in light of Respondents' objection, I have made no use of the International Union's interoffice memorandum (G.C. Exh. 14) of July 10, 1992, wherein NMAPC apparently agreed that "no action could be taken by [NMAPC] as it was not within our power to rule on, or get involved in local collective-bargaining negotiations." Whatever else, the substance is hearsay and although there was no question raised as to the authenticity of the memorandum, it was never served on Respondents and there was no technical demonstration of authenticity.

B. *Deferral in the Absence of a Grievance Procedure Ending in Arbitration*

As above noted, the Board generally does not defer resolution of an issue where the disposition is not covered by the contract through an arbitration provision. *The Developing Labor Law,* at page 1032 fn. 132, and cases cited therein.

In the instant case, however, the parties agreed to a limitation on the explicit NIMA obligation that the employer pay the wage rate set forth in the Local Union's current labor agreement for work performed in the Local Union's jurisdiction. That obligation exists "unless otherwise modified by [NMAPC]."

There is, however, no evident NIMA procedure for the invocation of a modification (by NMAPC) of Local Union wage rates under article VIII. It is also arguable that Ross Brothers' protest over the high wage rate is not a dispute arising over the application or interpretation of an existing collective-bargaining agreement, but merely a protest of the high wage rate, a defense rejected in *Oak-Cliff Golman Baking Co.*, 207 NLRB at 1064. Yet, it is clearly arguable that, unlike the facts and conclusions in *Oak-Cliff Golman,* there is room here for a finding that the article VIII wage rate terms authorize a protest or appeal by Ross Brothers to have NMAPC modify Local 577's wage rates. Thus, unlike *Oak-Cliff Golman* where there was repudiation of the agreement in violation of Section 8(d) and Section 8(a)(5) of the Act, in the instant case, Ross Brothers agreed to be bound by the NMAPC decision and invoked the contract provision permitting modification by NMAPC of the Local 577 wage rate.

Additionally, unlike *Oak-Cliff Golman*, where there was no contract provision which could remotely authorize the employer's refusal to pay the contract wage rate, here the NIMA Agreement specifically authorizes an appeal to NMAPC to "modify" the obligation to pay the local wage rate. In addition, Local 577 also involved NMAPC's help albeit in attempting to clothe the request as a "grievance." I believe, therefore, that Ross Brothers may arguably take the position that its June 8, 1992 protest to NMAPC (G.C. Exh. 9) is consistent with one of the Board's underlying supports in the rationale of both *Dubo Mfg. Co.*, 142 NLRB 431 (1963), and *United Technologies Corp.*, 268 NLRB 557, 558 (1984). In those cases, the Board implemented or expanded its deferral policy and relied, in pertinent part, on congressional intent as manifested in Section 203(d), 29 U.S.C. § 173(d) (1976). The Board, quoting from the Act, supported:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

It is arguable that, whatever else Ross Brothers' June 8, 1992 complaint relates to, it is not the "application or interpretation" of the new contract; rather it is specifically a protest of its high wage rate and, as an afterthought, Local 577's abandoning both its multicraft bargaining agency (Building and Construction Trades Council) and its collective-bargaining partner (Tri-State Building Contractors Association). Yet, since the thrust of Ross Brothers' protest is the wage rate, since the wage

rate, *by the agreement of the parties,* is subject to modification by NMAPC, and since both parties presented the issue to NMAPC, it seems to me consistent with the cōngressional intent that the Board might well entertain deferral based upon the language of article VIII (wages) and the essential thrust of Ross Brothers' June 8 protest to NMAPC concerning the high wage rates (G.C. Exh. 9). *Dubo Mfg. Co.,* supra.

Assuming, therefore, all elements favorable to deferral in favor of Ross Brothers' position, I would nevertheless recommend to the Board that it not defer on these facts. For, as in the case of the arguendo existence of a contractual grievance under the NIMA Agreement, supra, Respondent Ross Brothers here has rested on its oars for 11 months following submission of its protest against the Local 577 new wage structure (G.C. Exh. 8). Ross Brothers is apparently content with NMAPC's inaction in the disposition of its June 8, 1992 protest. There has been 11 months of NIMA inaction and 11 months of Ross Brothers failing to pursue the matter. I recommend that the Board not defer to this contractual process regardless of the omission of a contractual grievance procedure relating thereto. I conclude that Respondent Ross Brothers inaction for a period of 11 months militates against Board deferral.[17] I do not cast the burden on the Union of prodding NMAPC to dispose of the issue because the NIMA Agreement (art. VIII – wages) obligates the employer to pay the wage rates in the local agreement

---

[17] Under *Collyer Insulated Wire,* supra, 192 NLRB 837, *Duba,* supra, and *United Technologies Corp.,* supra, the Board's deferral is an exercise of its discretion.

"unless otherwise modified by [NIMA]." The Union has the benefit of the language as it exists. I conclude that the contract language places the burden of proceeding, and continuing to proceed, upon Respondent Ross Brothers since it is the party attempting to escape from an existing obligation of the NIMA Agreement to which it admits that it is bound. I would recommend to the Board deferral not be granted under the instant facts because the party seeking Board deferral is not acting with diligence in securing the exceptional rights it seeks pursuant to the contract on which it depends. In such a situation, deferral, with its attendant further delay, would only exacerbate what appears to be Ross Brothers' attempt, in substance, to escape from the financial terms of an otherwise lawful collective-bargaining agreement by a policy of inaction. Whatever other result flows therefrom, I cannot recommend to the Board that, exercising its discretion, it permit Respondent Ross Brothers to invoke that discretion thereby further delaying its contract obligation.

Thus, as above noted, I conclude that whether or not Respondent Ross Brothers' protest (G.C. Exh. 9) to NMAPC constitutes a contractual grievance pursuant to article VI of the NIMA Agreement or, nevertheless, constitutes a protest cognizable under the contract which would otherwise invoke the Board's deferral doctrine, I conclude that Ross Brothers' inaction militates against invoking the Board's deferral policy. In either case, I reach this result because Respondent Ross Brothers (a) failed to submit its protest to the American Arbitration

Association following NMAPC's failure to reach a decision (step 5, art. VI – grievances); or (b) because Respondent Ross Brothers, even if it is not in possession of a contractual grievance, failed to diligently pursue its rights under the contractual method supplied in article VIII – wages, for modification of the Local 577 wage rate by NMAPC. I therefore conclude that, in any event, there be no deferral of the Board processes and that the defense of deferral or mere breach of contract be rejected.

It is therefore my ultimate conclusion that Respondents' defenses, as above analyzed, do not meet the burden of rebutting the prima facie case of a violation of Section 8(d) and Section 8(a)(5) and (1) of the Act, *Oak-Cliff Golman Baking Co.*, 202 NLRB 614, 617 (1973).

The Violations with Respect to Huntington Piping, Inc.

Sam Hood, owner and president of Respondent Huntington Piping, is a member of the Tri-State Building Contractors Association and therefore, like Respondent Ross Brothers, is chargeable with notice of the April 8, 1992 communication from its bargaining agent, Tri-State Building Contractors to Local 577 protesting the $3.09-per-hour wage increase. Hood nevertheless testified that, around June 8 or 9, 1992, he first learned of the new wage rate upon receiving a one-sheet letter from Local 577 designating the new rates. At that time, he was engaged on a job with Dow Chemical Company in Ohio. For a 2-week period he paid his Local 577 plumbers at the new rates established by Local 577 (G.C. Exh. 8) until the matter of reimbursement could be cleared up with Dow Chemical. After paying the higher rate for 2 weeks, Dow

Chemical told Huntington Piping that it would not reimburse Huntington Piping for the higher rate. Huntington Piping then refused to pay its Local 577 plumbers at the higher rate and wrote of its dissatisfaction to Local 577 in June 1992 (G.C. Exh. 11; G.C. Exh. 12). In letters of June 12 and 24, 1992, Huntington Piping expressed "shock" at the $3.09 increase; told of their customers' displeasure with that wage increase; and notified Local 577 that Huntington Piping would not accept the terms of the new contract and wished to negotiate a new contract with Local 577 covering wages. Having received no response from Local 577, Huntington Piping, on June 24, notified Local 577 that henceforth all wages and fringe benefits would be paid at the contract rates of the expired contract to which it was a party (G.C. Exh. 5).

In a letter of August 14, 1992 (G.C. Exh. 15), Huntington Piping noted that the International Union had denied to it the extension of the NIMA Agreement to cover its Allied Signal Corporation project in Ironton, Ohio. At a prejob conference of August 4, 1992, Local 577 had insisted that the piping work on that project was within its jurisdiction and that it expected that the work be assigned to its pipefitters. Again noting the denial of the extension of the NIMA contract by the International Union to cover the job and Local 577's insistence on manning the project, Respondent Huntington Piping said that assignments would be made to Local 577 pipefitters but would be made under terms and conditions "identical to the [NIMA] agreement" although no formal NIMA Agreement existed on the project with the pipefitters. It insisted on paying the pipefitters pursuant to the terms of the expired collective-bargaining agreement (G.C. Exh. 5)

until a further collective-bargaining agreement was negotiated between it and Local 577 (G.C. Exh. 15).

Although the record is not clear on the point, it appears that Huntington Piping agreed to be bound by the provisions of the collective-bargaining agreement, and successor agreements, between Local 577 and the Southern Ohio Mechanical Contractors Association (G.C. Exh. 5) on or about May 27, 1986 (C.P. Exh. 3).

On August 17, 1992, the International Union (UA) wrote to Huntington Piping:

> Dear Mr. Hood:
>
> This will supersede our communications of July 2 and July 8, 1992 denying your request for the National Industrial Maintenance Agreement to cover work at Allied-Signal Corporation, Ironton Facility-Ironton, Ohio, which is located in the jurisdiction of United Association Local Union No. 577 of Portsmouth, Ohio.
>
> Please be advised that we have reconsidered your request to extend this Agreement and it has now been approved and may be placed into effect at the above named location. Please be advised that Local Union 577's 100% wage rate is $21.72 per hour, plus fringes. Please note that this site is approved at 90% wages, which equals $19.55 per hour, and 100% fringes.
>
> It is understood and agreed to by your signature to the National Industrial Maintenance Agreement that you will forward quarterly man-hour reports to Mr. Noel C. Borck, Impartial Secretary of the National Maintenance Agreements Policy Committee, Inc. Mr. Borck's

> office will forward your company the necessary reporting forms.

On August 21, 1992, Huntington Piping promptly responded to the International Union (UA) regarding the above August 17 letter which extended the NIMA Agreement to the Allied-Signal Corporation project under the jurisdiction of Local 577. In Huntington Piping's August 21 reply it acknowledges the extension of the NIMA Agreement to the Allied-Signal project but notes:

> We are in receipt of your letter of August 17, 1992, whereas the U.A. has apparently ignored our letter of August 14, 1992 (copy enclosed) and upon reconsideration has agreed to extend the National Maintenance Agreement to cover work at our Allied-Signal project in Ironton, Ohio.
>
> Our position is that the U.A. denied our request for an extension and we have assigned the work to Local Union 577 under an implied agreement identical to the terms, conditions and provisions of the National Maintenance Agreement.
>
> Furthermore, in response to the second paragraph of your letter, Huntington Piping, Inc. has no current contract with Local Union 577 and the wage rate to which you refer is purportedly a rate which applies to a contract which Local Union 577 has entered with a contractors association in another area, specializing in non-industrial work, of which Huntington Piping, Inc. is not affiliated.

At all times since Respondent Huntington Piping's discontinuance, after 2 weeks, of paying the plumbers working in Local 577's jurisdiction according to the terms

of the new contract between Local 577 and the Southeastern Contractors Association (G.C. Exh. 8), it has refused to contribute to Local 577's various fringe benefit funds according to the higher rates prescribed in the new contract. It has insisted on contributing to those funds according to the lower rates contained in the contract which expired on May 31, 1992, to which it was a party (G.C. Exh. 5). Periodic letters from Local 577 and its fund manager alleging the existence of shortages in fringe benefit contributions were met by Respondent Huntington Piping refusing to pay such additional moneys pursuant to the new contract (G.C. Exh. 8), alleging that it was neither a signatory of any contract with Local 577 nor a member of the Southeastern Contractors Association, and was contributing to the Local 577 benefit funds according to the rates in the expired contract (G.C. Exh. 5).

Discussion and Conclusions

Unlike the situation concerning Respondent Ross Brothers, Respondent Huntington Piping did not file a grievance requesting NMAPC to modify the wage and fringe benefit rates established by Local 577 and the Southeastern Mechanical Contractors Association in the new contract (G.C. Exh. 8). Rather, Huntington Piping's exclusive defense, on this record, appears to be that since it is not a party to any agreement with Local 577 and was not represented by Southeastern Contractors Association in the new contract, it is not bound by its terms. That defense, it seems to me, is an irrelevancy.

The dispositive issue is not whether Respondent Huntington Piping has a separate collective-bargaining obligation running to Local 577. Rather, it is whether Respondent Huntington Piping, at all material times, has been, and is, bound by the NIMA Agreement. That issue, I have found, above, has been settled by Respondents' concession on the record. Therefore, since Respondent Huntington Piping (as well as Respondent Ross Brothers) has been, and is, bound by the NIMA Agreement, it is bound by the NIMA requirement that work performed under the NIMA Agreement be paid pursuant to the wage rate established in the Local Union's agreement for work performed in the Local Union's jurisdiction. In the instant case, the International Union, somewhat belatedly, extended NIMA coverage to Respondent Huntington Piping on the Allied-Signal job. In fact, Respondent Huntington Piping requested such coverage which was finally granted to Respondent Huntington Piping by virtue of the International Union's August 17, 1992 letter (C.P. Exh. 2).

In short, therefore, where Respondents are bound by the NIMA Agreement and NIMA coverage is then granted to particular jobs in the Local 577 jurisdictional area, Respondents, on this record, like all other NIMA-bound contractors, are bound by the NIMA Agreement regardless whether they have any separate contractual relationship to Local 577. Since Respondents are bound by the NIMA Agreement and since the NIMA Agreement requires payment of both fringes and wages pursuant to the outstanding Local 577 agreement, Respondent Huntington Piping is bound by its NIMA obligation regardless

of, and in spite of, any failure to have a separate contractual relationship with Local 577.

I conclude, therefore, that Respondent Huntington Piping, in failing and refusing to be bound by the wage rates and fringe benefit rates in the existing Local 577 collective-bargaining agreement (G.C. Exh. 8), like Respondent Ross Brothers, has repudiated its collective-bargaining relationship with the International under NIMA. They have done so by unilaterally, and without consent, refusing to pay the wage and fringe benefit rates which they were obliged to pay under the NIMA Agreement. Such a failure is in derogation of Respondents' statutory obligations under Section 8(d) of the Act and they thereby engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. See *Oakcliff-Golman Baking Co.*, 202 NLRB 614 (1974); 207 NLRB 1063 (1973), enfd. 505 F.2d 1302 (5th Cir.1974), cert. denied 423 U.S. 826 (1975).

On the above findings of fact and the entire record in this case, I make the following

Conclusions of Law

1. The Respondents, Ross Brothers Construction Co., Inc. and Huntington Piping, Inc., and each of them, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. (a) United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the International Union or

UA), is a labor organization within the meaning of Section 2(5) of the Act.

(b) Local No. 577, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL – CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following constitute units appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> (a) All United Association employees of Ross Brothers Construction Company now employed and employed in the future for maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the United Association [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional supervisory employees as defined in the National Labor Relations Act, as amended.
>
> (b) All United Association employees of Huntington Piping, Inc. now employed and employed in the future for maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the United Association [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional or supervisory employees as defined in the National Labor Relations Act, as amended.

4. At all material times herein the International Union (UA) has been the exclusive bargaining representative of the employees in the aforesaid units within the meaning of Section 8(f) of the Act.

5. Since June 1, 1992, by virtue of the terms of the collective-bargaining agreements between the International Union (UA) and the Respondents, Respondents have been, and are, obligated to pay to their employees in the units described in paragraph 3 hereof, on NIMA-obligated jobs, the wages and benefits specified in the current collective-bargaining agreement between Local No. 577, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL – CIO, and the Mechanical Contractors Association of Southeastern Ohio.

6. Since on or about June 1, 1992, with respect to Respondent Ross Brothers Construction Co., and since on or about June 14, 1992, with regard to Respondent Huntington Piping, Inc. by unilaterally refusing to pay the wages and fringe benefits as described in paragraph 5 hereof to the employees in the aforesaid units according to the terms of the collective-bargaining agreements with the United Association, the Respondents have repudiated their statutory obligations to bargain with the International Union and have engaged in and are engaging in unfair labor practices within the meaning of Section 8(d) and Section 8(a)(5) and (1) of the Act.

The Remedy

Having found that Respondents have been engaged in certain unfair labor practices, I recommend that the

Respondents cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act including the posting of the notice attached to this decision.

Since the Respondents, and each of them, in derogation of their statutory obligations, unilaterally refused to pay the wage rates and other financial contract benefits of their employees in the above units, under the terms of the NIMA collective-bargaining contracts covering the employees, I recommend that the Respondents, and each of them, be directed to implement the wage rates and other benefits in the collective-bargaining agreement between Local 577 and the Southeastern Contractors Association (G.C. Exh. 8) *for any project under NIMA coverage* and to hereafter refrain from making such unilateral changes in wages, rates of pay, or other terms or conditions of employment of its employees in the above-described appropriate units during the term of the NIMA contract without first reaching agreement with or receiving permission from the International Union concerning such contemplated changes. Further, I recommend that Respondents, and each of them, commencing June 1, 1992 (or June 14, 1992, in the case of Huntington Piping), make whole their employees in the above-described appropriate units for any losses they may have suffered as a result of Respondents' unilateral reductions in contract wage rates, benefits, and other contract terms and conditions of employment, *Ogle Protection Service*, 183 NLRB 682 (1970), and include thereon interest as computed in *New Horizons for the Retarded*, 233 NLRB 1173 (1987). Respondents will also make whole Local 577 for underpayments to fringe benefit funds, with interest, and employees for expenses

incurred as a result of failure to make the fringe benefit contributions. *Gaucho Food Products*, 311 NLRB 1270 (1993).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondents, Ross Brothers Construction Company, Ashland, Kentucky, and Huntington Piping, Inc., Hunting, Weat Virginia, and each of them, and their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL – CIO, as the exclusive representative of employees in the following units with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> (1) All United Association employees of Ross Brothers Construction Co., now employed and employed in the future for maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the International Union (UA) [but excluding]

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[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional or supervisory employees as defined in the National Labor Relations Act, as amended.

(2) All United Association employees of Huntington Piping, Inc., now employed and employed in the future for maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the International Union (UA) [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional or supervisory employees as defined in the National Labor Relations Act, as amended.

(b) Instituting changes in wages, rates of pay, fringe benefits, or other terms and conditions of employment of employees in the above-described units during the effective term of the collective-bargaining agreement with the International Union (UA) covering the employees on any NIMA jobs without first reaching agreement with the International Union (UA) on any modification of the terms of the agreement.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Commencing June 1, 1992 (Respondent Ross Brothers Construction) or June 14, 1992 (Huntington Piping, Inc.), pay to all employees in the above-described

units the wages at the wage rates, and pay to Local No. 577, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL – CIO, the fringe benefits, prescribed in the agreement (effective 1992-1997) between Local 577 and the Mechanical Contractors Association of Southeastern Ohio, less any wages and fringe benefits previously paid respectively to the employees or Local 577, pursuant to any other formulation, on all such NIMA-obligated jobs; and make whole all such employees and Local 577 for any losses of wages or benefits they may have suffered by virtue of Respondents failure to pay such wages and benefits, with interest, on such wages and fringe benefits to be paid on the basis of the rates established and computed in *New Horizons for the Retarded*, supra, as set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay and fringe benefits due under the terms of the recommended Order.

(c) Post at Respondents' offices respectively, in Kentucky and West Virginia, copies of the notice attached marked "Appendix."[19] Copies of the notice on forms

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[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

provided by the Regional Director for Region 9, after being signed by the Respondents' authorized

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APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL – CIO (the United Association or the International), as the exclusive representative of employees in the following units with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

(1) All United Association employees of Ross Brothers Construction Co., now employed and employed in the future for maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the International Union (UA) [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional or supervisory employees as defined in the National Labor Relations Act, as amended.

(2) All United Association employees of Huntington Piping, Inc., now employed and employed in the future for maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the International Union (UA) [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional or supervisory employees as defined in the National Labor Relations Act, as amended.

representatives shall be posted by them immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by each of the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

WE WILL NOT institute changes in wages, rates of pay, fringe benefits, or other terms and conditions of employment of employees in the above-described units during the effective term of the collective-bargaining agreement with the International Union (UA) covering the employees or any NIMA jobs without first reaching agreement with the International Union (UA) on any modification of the terms of the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, commencing June 1, 1992 (Respondent Ross Brothers Construction), or June 14, 1992 (Huntington Piping, Inc.), pay to all employees in the above-described units the wages at the wage rates, and pay to Local No. 577, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL – CIO, the fringe benefits, prescribed in the agreement (effective 1992-1997) between Local 577 and the Mechanical Contractors Association of Southeastern Ohio, less any wages and fringe benefits previously paid respectively to the employees or Local 577 pursuant to any other formulation on all such NIMA-obligated jobs; and make whole all such employees and Local 577 for losses of wages or benefits they may have suffered by virtue of Respondents' failure to pay such wages and benefits with interest on such wages and fringe benefits.

ROSS BROTHERS CONSTRUCTION COMPANY

HUNTINGTON PIPING, INC.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

No. 95-5135

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL NO. 577, AFL-CIO, Intervenor, v. ROSS BROTHERS CONSTRUCTION COMPANY; HUNTINGTON PIPING, INC., Respondents.	ORDER (Filed Jul. 14, 1997)

BEFORE: KENNEDY and COLE, Circuit Judges; and COHN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc,

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* Hon. Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED
SEP 22 1997
CLERK

No. 97-170

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROSS BROTHERS CONSTRUCTION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that it should rule on the merits of the unfair labor practice charge brought in this case, rather than defer the matter to the grievance and arbitration procedure established by the collective bargaining agreement.

2. Whether petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to honor the collective bargaining agreement that the union had negotiated with a new employer association.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unpublished, but the judgment is noted at 113 F.3d 1235 (Table). The decision and order of the National Labor Relations Board (Pet. App. 12a-14a) and the decision of the administrative law judge (Pet. App. 15a-76a) are reported at 315 N.L.R.B. 538.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1997. A petition for rehearing was denied on July 14, 1997. Pet. App. 77a-78a. The petition for a

writ of certiorari was filed on July 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. At the relevant times, petitioner, an employer engaged in general industrial contracting, was a party to a national collective bargaining agreement with the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry (United Association). That national agreement, known as the National Industrial Maintenance Agreement for the United States of America (NIMA), made provision for wages, benefits, and other terms and conditions of employment to be negotiated at the local level by local unions and local employers' associations. Pet. App. 19a, 21a.

Under Article VIII of the NIMA, wage rates paid by an employer who was a party to the NIMA "shall be those as set forth in the current labor agreement of the affiliated Local Union where such work is to be performed and shall be paid to all employees under the terms of this Agreement unless otherwise modified by the National Maintenance Agreements Policy Committee, Inc. [NMAPC]." Pet. App. 21a. Similarly, under Article IX, various benefits were to be paid in accordance with the labor agreement negotiated by the local union. *Id.* at 22a. Thus, under the NIMA, an employer seeking the advantages of the coverage of the NIMA contract was required to pay the existing, negotiated wage structure in the local area based on a labor agreement that the local union negotiated with a local employers' association, whether or not that employer was itself a signatory to the local labor agreement. *Id.* at 28a-29a. Wage

rates could, however, be modified by the NMAPC, a committee consisting of equal numbers of representatives of employer and union members of the United Association, which was established to resolve grievances flowing from contract disputes. *Id.* at 21a, 23a-24a.

Under Article VI of the NIMA, grievances "other than those pertaining to jurisdiction or general wage rates on any work covered by [the agreement]" could also be submitted to the NMAPC, if not resolved in a more informal setting. Pet. App. 22a-23a. The failure of the NMAPC to resolve such grievances constituted a basis for submitting the question to the American Arbitration Association for a binding decision. *Id.* at 23a.

2. For several years, Plumbers Local 577, a local of the United Association, bargained through the Tri-State Building Trades Council (Trades Council) with the Tri-State Building Contractors Association (Tri-State) to establish the wages and benefits referred to in NIMA Articles VIII and IX. Pet. App. 27a. Negotiations between Tri-State and the Trades Council were conducted in two rounds. In the first round, representatives for the two sides bargained for a single percentage or dollar amount increase in wages and benefits to be uniformly applied, regardless of craft. In the second round, individual unions bargained with the appropriate specialty contractors on all other terms and conditions affecting their particular relationship. *Ibid.* As a member of the Trades Council, Local 577 had accepted the wages and benefits negotiated in the Tri-State multicraft agreement, and then incorporated those provisions into its own local contract, which it negotiated with a separate association, the Southern Ohio Mechanical Contrac-

tors Association. *Id.* at 27a-28a. Petitioner was bound by that contract. *Id.* at 28a.

In March 1991, the Trades Council and Tri-State agreed to commence negotiations for a successor wage and benefit agreement to begin after the then-current agreement expired on May 31, 1992. Pet. App. 29a. In May 1991, the members of Local 577 voted down the increase which Tri-State had offered, and its business manager gave notice to the Trades Council and Tri-State that Local 577 was withdrawing bargaining authorization from the Trades Council.[1] *Id.* at 30a-31a. Local 577 indicated, however, that it would continue to abide by the terms of the current agreement until its expiration on May 31, 1992. *Ibid.*

On March 6, 1992, Local 577 invited a newly formed multi-employer bargaining group, the Mechanical Contractors Association of Southeastern Ohio (Southeastern), to negotiate a collective bargaining agreement that would establish the general wage rates applicable under the NIMA. After bargaining sessions taking place over two days, Local 577 and Southeastern entered into a five-year agreement, effective June 1, 1992. Pet. App. 31a. That agreement established two different wage rates, for commercial contract work and for industrial work, and raised the hourly wage for industrial work by $3.09 per hour in the first year, followed by $1 per hour increases in the second and third years. *Id.* at 32a.

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[1] The ground rules for the negotiations permitted any member of either the Trades Council or Tri-State unilaterally to withdraw from the negotiations and to give notice that it would no longer be a party to any ultimate agreement. Pet. App. 29a-30a, 47a.

Petitioner refused to pay its employees the new industrial wage rate. Instead, on June 8, 1992, petitioner filed a grievance with the NMAPC, protesting the new wage rate. Petitioner requested in particular that the NIMA bring the wage rate covering Local 577 in line with wages for other building trades crafts in the area. Pet. App. 33a-36a, 51a-52a.[2] Local 577, in turn, asked the United Association for assistance in the grievance filed by petitioner, by bringing petitioner's refusal to pay the new contract rate before the NMAPC. *Id.* at 38a-39a, 52a. As of the date of the National Labor Relations Board's hearing in this case, in May 1993, the NMAPC had not formally acted upon either petitioner's grievance or Local 577's complaint to the United Association. *Id.* at 39a, 55a-56a.

On August 11, 1992, Local 577 filed an action against petitioner in district court, under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, based on petitioner's failure to pay wages and benefits under the new agreement. That action is still pending. Pet. App. 4a.

3. On November 30, 1992, the United Association filed an unfair labor practice charge with the National Labor Relations Board (Board), which forms the basis for the present proceeding. Pet. App. 4a. After a hearing, an administrative law judge (ALJ) concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C.

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[2] Petitioner asserted that the wage package of the Local 577-Southeastern agreement represented an increase of $3.09, whereas all other local unions had agreed to the Trades Council/Tri-State negotiated increase of $1.50 plus a 12-cent per hour drug testing fee. Pet. App. 34a.

158(a)(5) and (1), by unilaterally refusing to pay wages and benefits that it was obligated to pay under the terms of the Local 577-Southeastern agreement. The ALJ explained that, because petitioner conceded that it was bound by the NIMA obligation to pay the wage rates established in the collective-bargaining agreement negotiated by the local union, "there was a prima facie case of repudiation" of that contract obligation when petitioner failed "to pay the wage rates under the new contract." Pet. App. 43a. The ALJ reasoned that petitioner's "clear repudiation of the contract wage provision is not just a mere breach of the contract, but amounts * * * to the striking of a death blow to the contract as a whole, and is thus, in reality a basic repudiation of the bargaining relationship." *Id.* at 42a (quoting *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. 1063, 1064 (1973), enforced, 505 F.2d 1302 (5th Cir. 1974), cert. denied, 423 U.S. 826 (1975)).

The ALJ rejected petitioner's defense that the contract between Local 577 and Southeastern was invalid because it was not the result of arm's length bargaining. Pet. App. 43a-51a. The ALJ noted that there was "no evidence adduced" that any of the members of Southeastern were not engaged in industrial plumbing contracting, which is the subject of the wage rate to which petitioner objects. *Id.* at 45a. The ALJ also found no evidence of discriminatory motive, discriminatory application of the new contract, or conflict of interest. *Ibid.* He also noted that 30 other contractors had signed the new agreement. *Id.* at 45a-46a.

The ALJ also rejected petitioner's argument that the Board should defer to the NIMA's grievance procedure for resolution of the parties' dispute, rather than exercise its jurisdiction to rule on the United Association's unfair labor practice charge. Noting

that Article VI of the NIMA excludes from the contract grievance procedure grievances "pertaining to * * * general wage rates," the ALJ first concluded that deferral should be denied because the question whether petitioner was required to pay the new wage rates negotiated by Local 577, "having been clearly excluded, is not even arguably covered by the contract grievance procedure." Pet. App. 54a-55a.

The ALJ found further that, even if the wage rates were grievable, petitioner had "failed to comply with step 5 of the grievance procedure," which provides that the failure of the NMAPC to reach a decision "shall constitute a basis for a submittal of the question to the American Arbitration Association for a binding decision." Pet. App. 55a. As the NMAPC had taken no action on petitioner's grievance in 11 months, the ALJ concluded that "there has been a *failure* of NMAPC to reach a decision." *Id.* at 56a. The ALJ subsequently reiterated his conclusion that petitioner "has rested on its oars for 11 months following submission of its protest against the Local 577 new wage structure," and suggested that petitioner "is apparently content with NMAPC's inaction," given that petitioner was obligated to pay the wages negotiated by Local 577 unless and until they were modified by the NMAPC. *Id.* at 59a. The ALJ summarized by stating that deferral should not be ordered "because the party seeking Board deferral [petitioner] is not acting with diligence in securing the exceptional rights it seeks pursuant to the contract on which it depends." *Id.* at 60a.

4. The Board affirmed the ALJ's findings and conclusions, and adopted his recommended order. Pet. App. 12a-14a. That order, *inter alia*, requires petitioner to cease and desist from the unfair labor

practices found, and to reimburse its United Association employees and Local 577 for any losses they may have suffered as a result of petitioner's failure to pay the wages and benefits specified in the Local 577-Southeastern contract. *Id.* at 71a-73a.

5. The court of appeals, in an unpublished *per curiam* opinion, enforced the Board's order. Pet. App. 1a-11a. The court concluded that, since the NIMA did not provide for arbitration of wage disputes and petitioner did not pursue its claim to arbitration, the Board did not abuse its discretion in declining to defer the dispute to the contract grievance and arbitration procedure. *Id.* at 7a-8a. The court also ruled that the Board did not err in rejecting petitioner's claim that Local 577 and Southeastern had not engaged in arm's length bargaining. *Id.* at 8a.

ARGUMENT

1. Petitioner argues (Pet. 11-26) that the National Labor Relations Board erred in exercising its unfair labor practice jurisdiction over this dispute, and should have deferred to the outcome of the grievance procedure invoked by petitioner in protesting the new wage rates set by the agreement between Local 577 and Southeastern. The ALJ, the Board, and the court of appeals correctly concluded, however, that deferral was not appropriate or required on the facts of this case, in light of inaction on the grievance and petitioner's failure to pursue the matter to arbitration.[3]

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[3] Petitioner argues (Pet. 11) that it "sought to invoke the grievance processes for final and binding arbitration under Article VI to determine if [Southeastern] were a valid body with which a valid local agreement could be negotiated with Local 577 and if the contract they negotiated would be recognized as a valid local agreement under NIMA," and that

In *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), the Board, in the exercise of its discretion and in order to effectuate the statutory policy favoring voluntary settlement of labor disputes through arbitral processes (see 29 U.S.C. 173(d)), held that it would decline to decide disputes involving the interpretation of contract terms which were capable of resolution under the contract grievance and arbitration procedure, but instead would require the parties to submit such disputes to the contract procedure. In *United*

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the ALJ erred in treating this case as purely a dispute over wages. It makes no difference in this case, however, whether the ALJ may have erred to the extent that he appears to have concluded that petitioner was protesting only the wage rates set out in the Southeastern agreement. The ALJ reasonably read petitioner's June 8, 1992 letter to the NMAPC as complaining in principal part about the high rates set for industrial work in the Southeastern agreement. See Pet. App. 54a-55a. Although the letter (*id.* at 34a-36a) referred to Local 577's having abandoned both the Trades Council and its collective bargaining partner, Tri-States, the bulk of the letter protested the amount of the wage increase provided in the agreement. Also, the letter did not request the NMAPC to invalidate the agreement, but only to modify the amount of the wage increase. Nor did the ALJ overlook that, even if the Southeastern agreement were a valid local agreement, "there [was] still a question of whether the NIMA Policy Committee [would] reduce the [wage] rate [petitioner] must pay pursuant to Article VIII." Pet. 12. The ALJ recognized that, since Article VIII permitted the NMAPC to modify the wage rates in a local agreement, "the Board might well entertain deferral based upon the language of article VIII * * * and the essential thrust of [petitioner's] June 8 protest to NMAPC concerning the high wage rates." Pet. App. 59a. Nevertheless, the ALJ concluded that Board deferral to the contract procedure would not be appropriate in this case because "[t]here has been 11 months of NIMA inaction and 11 months of [petitioner's] failing to pursue the matter." *Ibid.*

Technologies Corp., 268 N.L.R.B. 557, 559 (1984), the Board reaffirmed and extended that policy, and stated that it would be "contrary to the basic principles of the [National Labor Relations] Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through [the arbitral] machinery." The Board cautioned, however, that its policy of deferral was designed to prevent the parties from "ignor[ing] their agreement and * * * petition[ing] [the] Board *in the first instance* for remedial relief," *ibid.* (emphasis added), and it noted that "deferral is not akin to abdication"; "[i]t is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed." *Id.* at 560.

On the facts of this case, the ALJ concluded that the parties' grievance mechanism had failed its "chance to succeed," and that petitioner had abandoned its opportunity under the NIMA to pursue to arbitration its effort to seek modification of the new wage rates. The ALJ noted that, despite "11 months of NIMA inaction" on petitioner's protest, petitioner had "rested on its oars" by failing to pursue the matter further. Pet. App. 59a. Given that petitioner was obligated under the NIMA to pay the wage rates established by the local agreement unless and until those rates were altered by the NMAPC, the ALJ found it reasonable to conclude that petitioner was "apparently content with NMAPC's inaction in the disposition of its June 8, 1992 protest." *Ibid.*

Thus, this case is not like *United Technologies*, where the Board declined to "jump into the fray" before the parties gave their arbitral machinery a chance to succeed. Nor is the Board's decision not to

defer to arbitration in this case contrary to its decision in either *Spann Building Maintenance Co.*, 275 N.L.R.B. 971 (1985), petition for review denied *sub nom.*, *Lewis* v. *NLRB*, 800 F.2d 818 (8th Cir. 1986), supplemental Board decision, 284 N.L.R.B. 470 (1987), supplemented, 289 N.L.R.B. 915 (1988), or *United Beef Co.*, 272 N.L.R.B. 66 (1984). Although the Board found on the facts of those cases that, despite delays in proceeding to arbitration, deferral to the grievance-arbitration procedure was still appropriate, it reaffirmed in both cases the principle that it would exercise jurisdiction over a dispute which has not "with reasonable promptness * * * either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration." See *Spann*, 284 N.L.R.B. at 470; *United Beef*, 272 N.L.R.B. at 68-69. Thus, the difference between the decision in this case and the decisions in *Spann* and *United Beef* turns on the Board's evaluation of the particular facts, rather than on a difference in legal principle.

This case is factually different from both *Spann* and *United Beef* in significant respects. In both *United Beef* and *Spann*, the charging party before the Board originally initiated the private-resolution mechanism through his union. In *United Beef*, the Board expressed concern that the union was seeking to avoid the unfavorable consequences of the arbitral and grievance machinery that it had invoked, see 272 N.L.R.B. at 68; in *Spann*, the Board concluded that, once the union invoked the grievance-arbitration mechanism, that process should be allowed to run its course, see 275 N.L.R.B. at 972. In this case, by contrast, petitioner first invoked the NMAPC's grievance mechanism, and the ALJ expressed concern that

petitioner was attempting to delay a resolution by the Board of the charge filed by the United Association by "not acting with diligence" on its grievance. See Pet. App. 60a. Nothing in *Collyer* suggests that the Board is required to defer to the contract grievance and arbitration procedure in a dispute in which the charged party has not been diligent in pursuing its arbitration remedy. Indeed, the *Collyer* deferral policy expressly provides that the Board will determine the dispute where it "has not, with reasonable promptness * * * either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration." *Collyer*, 192 N.L.R.B. at 843.

2. Petitioner further contends (Pet. 27-29) that the Board erred in requiring it to be bound by the contract that Local 577 negotiated with Southeastern because the principal negotiators on behalf of Southeastern owed "duties of loyalty to the Union [that] conflicted with their duties on behalf of [petitioner] and the other Industrial contractors." The ALJ and the Board found that there was no conflict of loyalty, and that the parties had engaged in arm's length bargaining (Pet. App. 13a, 45a-46a); that finding was upheld by the court of appeals (*id.* at 8a-9a). That factual issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the record fully supports the Board's finding that the contract was negotiated in good faith and at arm's length. The fact that several principals of Southeastern were also members of Local 577 is not of overriding significance, for it is not uncommon in the construction industry for contractors to retain their union membership. See *Nassau & Suffolk Con-*

tractors' Ass'n, 118 N.L.R.B. 174, 184 (1957) (recognizing that this practice is not unlawful, so long as the union does not attempt to exert unlawful influence upon the employer/union member and the employer/union member is not involved in union affairs to any significant degree). As the ALJ noted, the only record evidence regarding the ability of contractor/union members to work as journeymen plumbers (and thus enjoy the enhanced wages and benefits provided by the Southeastern agreement) was that, if they abandoned or severely limited their contracting function, they could be referred to jobs from the bottom of the Local 577 eligibility list. Pet. App. 31a n.7, 45a. Nor is there anything suspect in the fact that Local 577 and Southeastern came to an agreement a short period of time, or that the agreement established a separate rate for industrial contractors (including petitioner) that was higher than that for commercial work. The ALJ specifically found, based on the record before him, that "[t]he speed of execution and prior negotiations leading to the new contract does not constitute evidence of bad faith, discrimination, or overreaching." *Id.* at 46a. The ALJ also noted that there was no evidence adduced that any of the six contracting organizations that formed Southeastern were not engaged in industrial, as well as commercial, plumbing work, and that more than 30 other contractors working in the area signed the Southeastern agreement. *Id.* at 45a-46a.

Petitioner relies (Pet. 27-29) on court and Board cases holding that an employer may lawfully withdraw from a multi-employer bargaining unit when the evidence establishes that the employer's interests are not fairly represented by the association, or where the union is attempting to "whipsaw" employers into

an agreement by fragmenting the employer association. See *NLRB* v. *Siebler Heating & Air Conditioning, Inc.*, 563 F.2d 366, 370-371 (8th Cir. 1977); *Universal Enterprises, Inc.*, 291 N.L.R.B. 670, 671, 676-677 (1988). On the facts of this case, however, the ALJ found that the new contract was negotiated in good faith and at arm's length. Pet. App. 44a. That finding, which was sustained by the Board and the court of appeals, presents no legal issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1997

(3)

Supreme Court, U.S.
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No. 96-170

In The

Supreme Court of the United States

October Term, 1996

ROSS BROTHERS CONSTRUCTION COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES, LOCAL NO. 577, AFL-CIO,

Intervenor.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Given that the Labor Management Relations Act, codified in relevant part as 29 U.S.C. § 160(a), empowers the National Labor Relations Board to act to prevent any unfair labor practice regardless of any grievance/arbitration agreement between the two parties:

1. Whether the Court of Appeals for the Sixth Circuit erred in finding no abuse of discretion by the National Labor Relations Board over the Board's decision to retain jurisdiction over the dispute between the Petitioner, and the Intervenor rather than deferring the issue to a grievance/arbitration procedure contained in the National Industrial Maintenance Agreement to which both parties were bound.

2. Whether the decision by the National Labor Relations Board not to defer a dispute to arbitration where the grievance/arbitration procedure in the collective bargaining is not clear as to whether such a dispute is arbitrable, so far departs from the accepted and usual course of Board proceedings so as to warrant review by this Court.

PARTIES

The only remaining parties to this action are the Petitioner, Ross Brothers Construction Company, the Respondent, National Labor Relations Board, and the Intervenor, United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States Local No. 577, AFL-CIO.

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OPINIONS BELOW

The *per curiam* opinion of the Court below, No. 95-5135 dated April 29, 1997, is not officially reported and was not recommended for publication. It is unofficially reported as 1997 W.L. 215513, 1997 U.S. App. Lexis 1997. The decision of the Court denying the motion for rehearing and refusing the suggestion for rehearing *en banc* that was issued July 14, 1997, is not officially reported.

The decision of the National Labor Relations Board which adopted the decision of the Administrative Law Judge is reported as *Den-Ral, Inc.*, 315 N.L.R.B. 538 (1994). It is also reported at 148 L.R.R.M. 1304, 1994 W.L. 61618 (1994).

JURISDICTION

The decision of the Court of Appeals was entered April 29, 1997. On July 14, 1997, the Court denied Ross Brothers' *Motion for Rehearing and Suggestion for Rehearing En Banc*. The jurisdiction of this Court is being invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act, Section 8(a)(5), 29 U.S.C. § 158(a)(5):

> (a) Unfair labor practices by employer It shall be unfair labor practice for an employer

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

National Labor Relations Act, Section 10(a), 29 U.S.C. § 160(a):

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided,* that the Board is empowered by agreement with any agency of any State or Territory to cede such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications and transportation except where predominently local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has recieved a construction inconsistant therewith. [emphasis added].

Labor Management Relations Act, Section 203(d), 29 U.S.C. § 173(d):

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

STATEMENT OF THE CASE

The Petitioner, Ross Brothers Construction, is a party to a National Industrial Maintenance Agreement (NIMA) with the Intervenor, United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States, Local Number 577, AFL-CIO. Appendix to Petition for Certiorari; *hereinafter* "Pet. App.", 21a. Article 8 of the NIMA Agreement provides that the employer parties to the Agreement will pay the wage rates "as set forth in the current Labor Agreement of the affiliated Local Union" in whose jurisdiction the employer contracts to work. Pet. App. 21a. In consideration of the payment of the local wage rates, the signatory unions refer employees to the NIMA employers when called upon to do so, and promise that there will be no work stoppages.

Prior to 1992, negotiations for the plumbing and pipefitting contract applicable to Local 577 had been between Local 577 and the Southern Ohio Mechanical Contractors Association, with the wages being negotiated on a multi-union, multi-employer basis between the Tri-State Building Trades and the Tri-State Contractors Association. Pet. App. 21a.

In 1991, one year prior to the expiration of the wage agreement with Tri-State, the Association proposed a premature opening of the agreement to negotiate a successor agreement to begin after the former agreement expired on May 31, 1992. Although the parties agreed to wage and benefit increases in May, 1991, Local 577 voted down the proposed increases and gave notice to the parties in June of 1991 that it was withdrawing from the Trades Council.

Pet. App. 30a-31a. Local 577 took the amount of increase called for by the unexpired agreement and gave notice to the Association that it would not extend the contract after its expiration. *Id.*

Local 577 then proceeded to negotiate a five (5) year agreement with a newly formed multi-employer bargaining group known as the Mechanical Contractors Association of Southern Ohio. *Id.* Ross Brothers received notice of the Local 577-Southeastern agreement by April 8, 1992 and received a copy of the agreement on June 8, 1992. Pet. App. 53a. Petitioner Ross Brothers has, at all times since June 1, 1992, refused to pay the new wages and fringes negotiated by Local 577. Pet. App. 37a.

Despite the Petitioner's reported references to "secret" meetings negotiations, and allegations of collusion on the part of Local 577 and the Mechanical Contractors Association of Southern Ohio, neither the Administrative Law Judge, the Board nor the Sixth Circuit took exception with the agreement reached between the Association and Local 577. Pet. App. 9a. Record evidence shows that after the new contract's execution, as many as 30 contractors signed the new agreement and complied with its terms. Pet. App. 38a. Ross Brothers is the only contractor who still refuses to do so. The Administrative Law Judge's opinion, which was adopted by the Board and undisturbed by the Sixth Circuit was that "There is no evidence in this record to suggest a discriminatory motive, discriminatory application of the new contract or conflict of interest." Pet. App. 45a.

On August 11, 1992, Local 577 filed an action against Ross Brothers in the United States District Court for the

Southern District of Ohio, under § 301 of the Labor Management Relations Act, for failure to pay wages and benefits under the new agreement. 29 U.S.C. § 185. On November 30, 1992, the national organization for Local 577, the United Association, filed a charge against Ross with the Board. The Board moved to intervene in the district court § 301 action. Although the district court denied that motion, the parties reached a settlement on the Board's appeal from that order, with Ross agreeing to allow the Board to intervene as a full party subject to the orders of the district court. Ross Brothers then filed a motion in the district court to stay all proceedings before the Board pending trial in the district court.

After a hearing before the Board, the Administrative Law Judge (ALJ) issued a decision finding that Ross violated § 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1), by unilaterally refusing to pay wages and benefits that they were obligated to pay by the terms of the Local 577-Southeastern agreement. Pet. App. 67a. The Board adopted the findings of the ALJ and ordered Ross Brothers to cease and desist from unfair labor practices, to implement the wage and benefit terms of the Local 577-Southeastern agreement, and to make employees whole for any loss of wages and benefits suffered as a result of Petitioner's unfair labor practices. Pet. App. 70a-71a.

The National Labor Relations Board then made an Application for Enforcement of its order to the Court of Appeals for the Sixth Circuit. On April 29, 1997, the Court of Appeals issued a *per curiam* decision granting the Application for Enforcement. On July 14, 1997, the Court

also denied Ross Brothers' *Motion for Rehearing and Suggestion for Rehearing En Banc.* A *Motion to Stay Issuance of the Mandate* was granted on August 15, 1997. Ross Brothers is now before the United States Supreme Court requesting a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I. The Policy Arguments Relied Upon by the Petitioner is Fundamentally Opposed to the Language of 29 U.S.C. § 160(a), Which Grants the National Labor Relations Board the Authority to Intervene in a Dispute to Prevent the Commission of an Unfair Labor Practice Regardless of any Contractual Grievance Procedure.

The Petitioner's first argument in favor of certiorari involves the refusal of the Administrative Law Judge to refer this matter to arbitration before ruling on the failure of Ross Brothers Construction to pay the wages required under the local agreement. Pet. 11-26. It is the Petitioner's contention that the charges under § 8(a)(1) and (5) of the National Labor Relations Act should have been dismissed and the dispute resolved through the grievance procedures contained in the NIMA Agreement, to which both parties were bound. *Id.*

The Petitioner's argument fails on two fronts. First, as will be discussed *infra,* there was no clear commitment by the parties to bind themselves to an arbitration/grievance procedure that would have jurisdiction over general

wage rate disputes. Secondly, and perhaps more importantly, is the fact that even if it can be shown that the grievance/arbitration procedures would apply to the dispute over wages, the National Labor Relations Board is still under no duty to send the dispute to arbitration.

A review by this Court would involve only questions of fact applied to familiar legal rules of the National Labor Relations Act. These legal rules were fully known to the Administrative Law Judge, the National Labor Relations Board, and the Court of Appeals for the Sixth Circuit at the time they made their respective decisions. Because this is simply an argument of the application of the facts by the Petitioner, and the Sixth Circuit Court of Appeals ruled that the Board's findings were supported by substantial evidence, the petition should be denied.

The Board derives its power and authority from the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* It is undisputed by the Petitioner, that the NLRA is empowered to prevent the commission of an unfair labor practice by any person. 29 U.S.C. § 160(a). This same section of the NLRA specifically and unequivocally states that "This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." *Id.* This section has been cited to emphasize that the Board acts in the public interest to enforce public, not private rights, and that the "parties cannot by contractual agreement divest the Board's function to operate in the public interest." *Gulf State Manufacturers*, 598 F.2d 896, 901 (5th Cir. 1979) (*en banc.*) Backed by the force of this statute, the Sixth Circuit rejected the Petitioner's deferral argument and granted the *Application For Enforcement of an Order of*

the National Labor Relations Board. In doing so, the Sixth Circuit held:

> *Although arbitration is deemed a preferred means of settling labor disputes, "it is . . . settled that the Labor Board need not refrain from exercising its authority to enforce the Act merely because arbitration procedures are available." Newspaper Guild Local 10 v. N.L.R.B., 63 F.2d 550, 558-559 (D.C. Cir. 1980). Accord N.L.R.B. v. Bay Shipbuilding Corp., 721 F.2d 187, 191 (7th Cir. 1983) ("The availability of arbitration procedures does not oblige the Board from exercising its statutory authority.") (citing N.L.R.B. v. Strong, 393 U.S. 357, 360-61 (1969)). See also, e.g., N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 436-437 (1967) (finding no deferral of dispute over union's entitlement to information alleged as necessary to prepare case before arbitrator).*

To counter this obvious problem to its position, the Petitioner cites to Section 203(d) of the Labor Management Relations Act, which reads:

> *Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application of or interpretation of an existing collective bargaining agreement. 29 U.S.C. § 173(d).*

The shortcoming to the use of § 203(d) is addressed by the *Collyer Insulated Wire* decision upon which the Petitioner relies. 192 N.L.R.B. 837 (1971). In its analysis of the case, the *Collyer* Board acknowledged that Section 203 of the LMRA did not specifically apply to the National Labor Relations Board, and it cited several other decisions which held that the Board was under no statutory preclusion for hearing cases that had been submitted to

arbitration. *Id.* at 840. The decision by the Board to defer the dispute in *Collyer* to the grievance/arbitration provisions was a policy decision which was made about a grievance "well suited to resolution by arbitration" and clearly covered by the applicable contract language. *Id.* at 842. However, this narrow policy statement by the Board is now being twisted by the Petitioner to suggest that the Board must always defer to arbitration and grievance procedures, even through the applicable case law and 29 U.S.C. § 160(a) suggest otherwise. Such an application of Board policy is clearly erroneous and cannot override the clear delegation of power granted by Congress via 29 U.S.C. § 160(a).

II. Unlike the Situations Considered by the National Labor Relations Board in *Collyer*[1] and *United Technologies*,[2] the Dispute Between the Petitioner and the Intervenor is Not Governed by the Grievance/Arbitration Provisions of the Collective Bargaining Agreement.

The allegedly "conflicting" decisions relied upon by the Petitioner designed to show that the Board must defer to the grievance/arbitration provisions, are distinguishable on their facts. The Petitioner first cites to *Collyer Insulated Wire Co.* in support of its argument for deferral. 192 N.L.R.B. 837 (1971). This case provides for the deferral of disputes from the Board to the contractual

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[1] 192 N.L.R.B. 837 (1971)

[2] 268 N.L.R.B. 557 (1984)

grievance machinery in limited circumstances.[3] Not surprisingly, the Petitioner fails to address the preliminary circumstances that must be present before the Board will exercise its discretion and allow the dispute to be heard before an arbitrator as called for by the terms of a collective bargaining agreement. For purposes of this dispute, the most important circumstance noted by the Board which must be present is a contract that "*clearly* provides for grievance and arbitration machinery". *Id.* at 841. The *Collyer* decision was based upon a collective bargaining agreement which "unquestionably obligates each party to submit to arbitration any dispute arising under the contract." *Id.* at 842. In the present situation, there was no clear, unquestionable commitment by the parties to use the grievance machinery of the NIMA Agreement. For that reason, the general deferral language of *Collyer* and other cases cited by the Petitioner offer little guidance to the outcome of this case.

The Petitioner is attempting to argue that the dispute between the Parties should have been dealt with through the terms of the NIMA Agreement. Pet. 11-26. The problem with this position is that there is a conflict between two provisions of the NIMA Agreement, which makes it

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[3] The *Collyer* Board held *inter alia,* that the contract must clearly provide for grievance and arbitration; the unilateral action cannot be designed to undermine the Union; it cannot be patently erroneous, but must be based on a substantial claim of contractual privilege; and the arbitration interpretation of the contract must resolve the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act. 192 N.L.R.B. 837, 891; *Citing, Jos. Schlitz Brewing Company,* 175 N.L.R.B. 23.

impossible to tell what was contemplated by the parties at the time they signed the document. The two articles of the NIMA Agreement which are relevant to the Petitioner's deferral argument are articles VIII and VI. The Petitioner relies upon Article VIII to argue that the dispute over the new wage rate should be submitted to arbitration. Article VIII provides:

> *Wage rates shall be those as set forth in the current Labor Agreement of the affiliated Local Union where such work is to be performed and shall be paid to all employees under the terms of this agreement unless otherwise modified by the National Maintenance Agreements Policy Committee, Inc.*

It is the Petitioner's position that the possibility of the modification of the wage rates by the National Policy Committee means the dispute over the new wage rate is appropriate for arbitration. However, an inherent conflict in the grievance/arbitration provisions arises out of article VI which reads:

> *Grievances, other than those pertaining to jurisdiction or general wage rates on any work covered by this agreement shall be handled in the following manner* [emphasis added]:
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> *Step 1. . . .*
>
> *Step 2. . . .*
>
> *Step 3. . . .*
>
> *Step 4. If the parties are unable to effect an amicable settlement of [sic] adjustment of any grievance or controversy, such grievance or controversy shall be submitted to [NMAPC] for a decision to become effective immediately.*

> *Step 5. Failure of [NMAPC] to reach a decision shall constitute a basis for a submittal of the question to the American Arbitration Association for a binding decision . . . The affected parties to the arbitration shall equally share in the cost, including printing and publication of any record of such arbitration.*
>
> *The Arbitrator shall only have jurisdiction and authority to interpret, apply or determine compliance with the provisions of this Agreement.*

As a result of these two articles, the Board was forced to reconcile one provision of the Agreement that appears to contemplate modification of wage rates by the committee, and another provision which expressly excludes general wage rates from the grievance procedure. Unfortunately, such an inherent conflict cannot be fairly and equitably interpreted to reflect the true meaning and intent of the parties at the moment they signed the Agreement. It is this irreconcilable conflict between the provisions of the NIMA Agreement that distinguishes this case from the cases upon which the petitioner relies.

As discussed previously, the *Collyer* Board faced a situation in which there was an unquestionable commitment by the parties to be bound by the grievance/arbitration procedures. Therefore, the policy issues discussed by the Board in *Collyer* and cited by the Petitioner must be read in that context. It is highly probable that if the agreement were not so clear, and the Board could not be certain that both sides intended to be bound by its terms, that the decision to defer to the grievance machinery may have not been made. Nonetheless, because the background which provides the basis of the opinion is so

vastly different, the *Collyer* case is of little use in determining the proper outcome of this decision.

The Petitioner also relies upon *United Technologies* in an effect to bolster its deferral argument. 186 N.L.R.B. 557 (1984). Reliance on this case is also misplaced. The dispute at issue in *United Technologies* was a threat which was violative of Section 8(a)(1), but which was also *"clearly recognizable under the broad grievance/arbitration provision* of . . . the collective bargaining agreement." [emphasis added] *Id.* The lack of such a clear commitment to grievance/arbitration procedures involving wage rates, by Ross Brothers and Local 577 severely erodes any substantive precedential value of these deferral-type cases.

The dispute between the Petitioner and Local 577 is more properly resolved under the Supreme Court's decision in *N.L.R.B. v. C&C Plywood Corp.*, 385 U.S. 421 (1967). In that case, the Board issued a cease and desist order against an employer for the installation of a premium pay plan without the knowledge or consent of the Union. In overruling the Ninth Circuit which denied enforcement of the order, the Supreme Court noted that the absence of a grievance/arbitrator provision in the agreement meant that the Board's action "was in no way inconsistent with its previous recognition of arbitration as an instrument of national labor policy for composing contractual differences." *Id.* at 426, *citing, International Harvester Co.*, 138 N.L.R.B. 923 (1962). So too here, the exclusion of general wage rate disputes from the grievance/arbitration provisions of the NIMA agreement means that the Board in no way abused its discretion in refusing to defer the case to arbitration. Therefore, the petition should be denied.

III. The Decision by the National Labor Relations Board Does Not Depart From the Principles Established Under *Collyer*,[4] or *United Technologies*,[5] and Is Not a Significant Change in Philosophy Which Warrants Review.

As fully discussed *supra*, the *Collyer* and *United Technologies* decisions both stood for the general proposition that an employer and a Union who have established dispute resolution machinery culminating in final and binding arbitration, should have to use that mechanism prior to petitioning the Board for relief. This policy is based upon the belief that collective bargaining agreements which provide for final and binding arbitration of disputes and grievances encourage industrial peace and stability. *Collyer* at 840. The refusal to send the dispute to arbitration as demanded by the Petitioner in no way erodes these important objectives. In cases where it is clear that both parties have voluntarily and knowingly bargained away important rights and have subjected themselves to broad arbitration provisions, deferral to that machinery will continue to be an appropriate policy decision by the Board. However, in cases such as this, where ambiguity prevents the Board from finding that both parties clearly committed themselves to a particular grievance procedure it is appropriate and equitable for the Board to retain jurisdiction over the dispute.

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[4] 192 N.L.R.B. 837 (1971)

[5] 268 N.L.R.B. 557 (1984)

CONCLUSION

The National Labor Relations Act specifically grants the National Labor Relations Board the power to prevent the commission of an unfair labor practice by any person. 29 U.S.C. § 160(a). This same Section of the Code also states that this power will not be affected by any other agreement between the parties. *Id.* Although it is true that the Board follows a general policy of deferral in cases where it is clear that both sides have committed themselves to grievance/arbitration provisions, this is not such a case. The conflict between the dueling provisions of the agreement means that the Board was clearly justified in refusing to send the dispute to arbitration as demanded by the Petitioner. The action by the board was not a substantial deviation from the accepted and usual course of proceedings, nor was it an abuse of discretion. For these reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted:

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